Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

TINA SCHEVE and MARK W. STEVENS,

Petitioners,

vs.

THE MOODY FOUNDATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What effect does explicit hostility towards the recusal of a prior judge in the same case have upon the standard of review of sanction orders?

2. Does the *prima facie* case for wrongful discharge from employment under 29 USC Sec. 1140 includes a requirement for "specific intent" to prevent a plaintiff from exercising her rights under ERISA?

3. Under what circumstances if any may the entire cost of litigation, or a multiple thereof, be shifted onto counsel under 28 USC Sec. 1927 or under the district court's "inherent authority"?

4. Under what circumstances if any may the entire cost of litigation, including attorneys fees, be shifted by 29 USC Sec. 1132(g) onto a Plaintiff claiming wrongful discharge under ERISA Sec. 510, 29 USC Sec. 1140?

LIST OF PARTIES

Petitioner Tina Scheve is a citizen of Texas.

Petitioner Mark W. Stevens is an attorney at law in Galveston, Texas.

Respondent The Moody Foundation is headquartered at Galveston, Texas. Respondent's principal holding is the American National Insurance Company (ANICO) also headquartered at Galveston, Texas.

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OPINIONS BELOW

The Opinion of the Court of Appeals below is unpublished. App.-A, App. 2-3.

The transcript of the original court's statements on January 13, 2000 are found at App.-B, App. 4 ff.

The findings and opinions of the subsequent district Court on Summary Judgment were stated from the bench and are found at App.-D, App. 12 ff., with Interlocutory Judgment at App.-C, App. 11.

The Final Judgment imposing attorneys fees is at App.-E, App. 32.

The opinions of the trial court with respect to imposition of attorneys fees and sanctions were announced from the bench, transcript at App.-F, App. 33 ff.

The Order of the Court of Appeals denying rehearing on August 2, 2001 is at App.-G, App. 52-53.

JURISDICTION

This suit for wrongful discharge from employment was filed under ERISA Sec. 510, 29 USC Sec. 1140.[1] Exclusive jurisdiction is vested in federal district courts under 29 USC Sec. 1132(e)(1). Appellate jurisdiction is conferred by 28 USC Sec. 1291.

The judgment of the Court of Appeals was filed on June 20, 2001. (App.-E, App. 32). Appeal was timely filed and a per curiam order affirming entered on June 20, 2001 (App.-A). A timely filed Petition for Rehearing *En Banc*, was treated as a petition for rehearing and was denied on August 2, 2001. (App.-G, App. 52-53).

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[1] Hereinafter ERISA Sec. 510.

STATUTES AND CONSTITUTIONAL PROVISIONS

ERISA Sec. 510: "It shall be unlawful for any person to discharge, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, or Section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 USC Sec. 301 et seq] or for the purpose of interfering with the attainment of any right to which such participant *may become entitled* under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this section." [Emphasis Added]

29 USC Sec. 1132(g): "Attorneys fees and costs; awards in actions involving delinquent contributions. (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

28 USC Sec. 1927: "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct."

U.S. Const. Amd. XIV: "No state . . . shall deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

The Moody Foundation controls the American National Insurance Company (ANICO), and writes its health care group plan through that same company. Petitioner Tina Scheve was a Foundation employee for two years and was covered under that plan for, *inter alia*, depression and gynecological procedures including Papanicolaou or "pap" smears.

Petitioner Scheve was fired on April 20, 1999, and sued the Foundation for wrongful discharge under ERISA Sec. 510. Suit was originally filed in the U.S. District Court at Galveston, within a few blocks of the Foundation headquarters.

On January 13, 2000, the resident trial judge[2] was vehemently critical of Plaintiff's counsel. A motion to recuse and complaint of judicial disability or misconduct were filed on January 21, 2000 with the trial court and court of appeals, respectively. The Galveston trial judge recused one week later, and the Court of Appeals subsequently issued an order reciting that "Appropriate corrective action has been taken", and closing the case under 28 USC Sec. 372(c)(3)(B) on February 8, 2000. (App.-H)

The case was transferred to the Houston division.[3] Summary judgment was pronounced on May 23, 2000. (Transcript, App.-C, App. 12 ff.). At the close of the May 23 hearing, the Court called for briefs on fee shifting.

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[2] The Hon. Samuel B. Kent.

[3] The Hon. Lynn N. Hughes.

Defendant moved for fee shifting against Defendant under ERISA 29 USC Sec. 1132(g)(1), and against her counsel under F.R.C.P. 11 and 28 USC Sec. 1927.

Hearing on attorneys fees was held in Petitioners' absence June 20, 2000. The Court was aware that Petitioners claimed non-receipt of notice. App.-F, App. 33-35. At that hearing, the trial court was explicitly critical of the fact that Plaintiff's counsel had filed a motion to recuse in Galveston, citing it as evidence of "bad faith", App. 47, and describing recusal practice generally as "silly." App. 38. The Court granted judgment of $37,730.49 "for costs and attorneys fees" against Plaintiff and her counsel jointly, and further wrote, "The Foundation recovers from Mark Wandless Stevens $35,230.49" without specifying the grounds. (App.-E, App. 32).

In a one-page per curiam opinion (App.-A), the Court of Appeals panel affirmed summary judgment, ostensibly because Plaintiff had failed to make her *prima facie* case, i.e., a showing of "specific intent to deprive [Plaintiff] from exercising her rights under ERISA." Invoking the "abuse of discretion" standard, the panel affirmed the judgment and sanctions. (App.-A.)

Petitioners timely moved for rehearing *en banc*. Rehearing was denied on August 2, 2001.

II. RELEVANT BACKGROUND FACTS

A. FACTS AT SUMMARY JUDGMENT

The Moody Foundation of Galveston, Texas controls over 60% of the stock of American National Insurance Company (ANICO), which in turn is the insurer under the Foundation's group health plan.

Petitioner Tina Scheve had worked at the Foundation for about two years, receiving one raise (of $2,000 per year) and a promotion from receptionist to bookkeeping duties in November, 1998. There were no written indications of dissatisfaction with her until the "secret" letters described below were written.

Mrs. Scheve was medicated for depression in 1998 and 1999. She was injured in an auto accident on December 4, 1998, and was off work for rotor cuff surgery for two months, to approximately February 2, 1999. She was repeatedly assured by Foundation executive Harold McDonald that she was doing well.

Mrs. Scheve had at least one irregular pap smear in February, 1998, and claimed that bleeding interfered with follow-up tests because clinically useful specimens could not be taken. On March 19, 1999, Mrs. Scheve made another appointment with her doctor for April 23, advising her boss Debbie Beddoe (on March 19) of the forthcoming pap smear to clear time off. According to Scheve, Beddoe warned of the danger of "cancer" (Beddoe's word) during those discussions.

Shortly after March 19, two secret letters intensely critical of Scheve were written by co-worker Patricia Ennis (March 30) and Beddoe (April 5). These letters attempted to catalog every alleged misdeed of Mrs. Scheve back to the beginning of her employment, leapfrogging back past her intervening promotion and raise in pay. The letters required prolonged effort; one listed an entire page of absences over the course of her employment. Scheve denied the substance of the criticism and specifically noted that the absences had been routinely "comped" and were never the source of criticism to her.

Foundation Executive Director Doug McLeod testified in deposition that he was surprised to learn that Scheve had been fired, and said that complaints of her performance were "very rare." McLeod did not even remember an incident of May 6, 1998 which allegedly centered around McLeod and which featured prominently in the "secret" letters.

The letter by Ms. Ennis (March 30) specifically disparaged the severity of Mrs. Scheve's depression: *"Her physician put her on medication for the depression and Tina missed work for an entire week with the excuse that she was trying to get adjusted to the medications."*

The Beddoe and Ennis letters were faxed, with a significant query, to Trustee Francine Moody on April 5, 1999: *"Please advise me of any changes you would like made to this document."* On April 6, Ms. Moody faxed back: *"File in Tina's Personnel File."*

Scheve was not fired for two more weeks. The Foundation made no effort to explain why she was worked by the Foundation to within three days of her forthcoming pap smear, and was fired summarily on April 20, 1999 – thereby terminating coverage under the ANICO plan on that date.

In a tape recorded conversation after Mrs. Scheve was fired,[4] Foundation Trustee Francine Moody refused to articulate any reason for Scheve's discharge, either to Mrs. Scheve during a telephone call (*"Well, I'm not going to get into any details and specific incidents"*) or to Counsel.

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[4] The post-firing conversations with Francine Moody and Harold McDonald were taped by Mrs. Scheve, and copies provided to opposing counsel well before suit was filed.

Foundation Executive Harold McDonald declined to give any reason for the firing at the time or after, but provided this glimpse into the decision process in his phone conversation with Mrs. Scheve:

> I'll be honest with you, before I talked to you I talked to the lawyers. What can I say and what can't say. I don't want to get in trouble. I don't want to get the Foundation in trouble. I don't want to get you in trouble. I want to do you know, what is right. So the less you say the better you are.

At Summary Judgment hearing on May 23, 2000 (App.-C), the trial judge conceded the probative force of the circumstantial evidence presented, but essentially conducted a bench trial on affidavits:

> The retroactive memos are equally likely to be explained by the Foundation's dissatisfaction, which ripened into a fire before the examination, even if it is equally likely that the addition of the memoranda to her file was triggered by knowledge of her appointment for the damage [sic; "exam"], the equal likelihood makes her not carry the burden.

App.-C, App. 27.

B. FACTS AT ATTORNEYS FEE HEARING

On June 6, 2000 – three days before Petitioners' response date – the trial court apparently issued an order by fax which set the attorneys fee hearing for June 20 at 10:00 a.m. The order of hearing stated: *"To insure full notice, each party who receive this notice must send a copy of it to every other party even if they may have been sent one by the court."* (App.-I, App. 55-57). (Provided to Petitioner Stevens June 26, after June 20 hearing).

Just prior to the June 20 hearing, the Houston trial court telephoned Petitioner Stevens at his office in Galveston, and was told that counsel was unaware of the hearing. The Court made no inquiry about re-faxing of the notice. (App.-F, App. 33-35). Defense counsel, asked if he had otherwise notified counsel of the setting, simply evaded the court's question: " . . . *I cannot recall whether we talked about the hearing or not.*" *Id.* The court moved ahead with the hearing.

Materials before the court on June 20 nevertheless detailed the pretrial investigation of counsel:

Pretrial investigation by counsel included listening to and transcribing two audiotapes, described above, of conversations with Francine Moody and Harold McDonald.

Pretrial investigation also included an exchange of seven letters between Petitioner Stevens and the Foundation or its Counsel. By letter of May 11, 1999, Plaintiff's counsel informed defense counsel of a seriously dysplastic pap smear and demanded COBRA conversion, for which Mrs. Scheve had not yet received the required forms. COBRA conversion was denied,[5] and suit was filed June 30.

Without her office calendar, which was left at her desk at the Foundation, Mrs. Scheve told her lawyer that the pap smear in question had been given on April 5, 1999. That *appeared* to be confirmed by the "April 5" date

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[5] Admitted in the Summary Judgment record. The Foundation claimed it had too few employees to be required to grant COBRA. But see, *Kidder v. H&B Marine*, 932 F.2d 1379 (5th Cir. 1991) (COBRA subject to attribution rules re subsidiary employees). The Houston trial court ordered documents produced to address the Foundation's contention, but never addressed the issue thereafter.

in the middle of the pathology report (App.-J). April 5 was mistakenly alleged in the Original Complaint as the date of the final pap smear.

Following discussions between counsel after suit was filed, the April 5 date was in some question as of January 13, 2000 and the Galveston trial court was so advised on January 13. App.-B, App. 7.

Plaintiff has never alleged that she has "cancer". Plaintiff had cervical dysplasia. Her complaint alleged in lay terms that she "had been diagnosed with possible cancer,"[6] "possible cervical, uterine or other cancer," etc. The Galveston trial court purported to misread the Complaint, attacking Plaintiff's counsel:

> THE COURT: And I'm going to tell you flat out, if there is not compelling evidence presented to this Court that this woman has cancer, as that term is defined in common medical usage at this hearing [sic], I am going to absolutely go nuts. I think this is the most personally insulting allegation to have ever been brought before this court given the personal circumstances of this Court and I am not going to take it lightly. If it turns out that you brought this suit claiming this woman has cancer [sic] when, in fact, she has **some irregular cellular structure that doesn't even give rise to that** [sic], you're going to be sorry. Am I clear?
>
> MR. STEVENS: Judge, I must say –

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[6] A clinically correct assertion. See Affidavit of Kevin Barrett, M.D., CR00553, on Reply to Motion for Attorneys fees. Cf. *Wheat v. United States*, 860 F.2d 1256, 1257 (5th Cir. 1989) (dysplasia an "early warning sign of cervical cancer").

> THE COURT: Don't you say another word, by God, or I'll hold you in contempt today. Am I clear?
>
> MR. STEVENS: Yes, sir.

App.-B, App. 10. (Emphasis Added)

Subsequent consultation with a physician (c. January 15) indicated that the April 5 date did not refer to the pap smear, and that the correct date was probably April 23. That fact was confirmed to the Defense on January 26, 2000, by answers to interrogatories.

The initial theory of the case, i.e., that the Foundation had advanced knowledge of the pap smear ***result*** and fired Mrs. Scheve on that basis, was supplanted by the theory – advanced in answers to interrogatories on January 26, 2000 – that the Foundation on April 20 fired Scheve to avoid the ***risk*** of further expenses that might result from the forthcoming April 23 pap smear.

Both theories were consistent with Counsel's experience in prior litigation[7] involving ANICO and Moody interests. One Ralph LaPaugh had a heart attack covered under a John Alden Life Plan which covered him and other employees of "The Colonel, Inc."[8] ANICO desired to take over coverage from John Alden. Preparatory to that move, LaPaugh was specifically identified as an unacceptable risk to ANICO on a June 14, 1990 to Robert

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[7] No. G-92-170, *Ralph LaPaugh vs. John Alden Life Ins. Co., et al.* This suit was brought by Petitioner Stevens and defended by the Foundation's counsel herein (Greer, Herz *et al.*) in the U.S. District Court at Galveston. It was concluded by settlement in 1994, before Judge Kent.

[8] "The Colonel", a full size replica paddlewheel excursion boat, was named after the Moody Foundation founder Colonel Robert Moody, and was heavily or totally subsidized in its operations by the Foundation.

L. Moody, **Jr.** App.-N, App. 68.[9] The ***next day***, June 15, 1990, LaPaugh was approached on the job and asked to "opt out" of health care coverage, and did so, churlishly, noting the improper request on his form. App.-N, App. 70.[10]

That response by LaPaugh was an obstacle, clearly invalidating his "waiver". Over the Summer of 1990, LaPaugh's health history was probed by John Alden Life, with all correspondence copied to Robert L. Moody, **Jr.**[11] LaPaugh, suspicious, inquired as to why the younger Moody was listed on correspondence, and was advised that the younger Moody was the agent for John Alden. See App.-P, Q, App. 71, 72.

On or about October 1, 1990, LaPaugh was fired pretextually. See Texas Employment Commission findings, App.-S, App. 77. By letter dated October 1, 1990, John Alden Life voided LaPaugh's application retroactively; refused to pay substantial medical bills; and refunded his premiums to The Colonel, Inc. App.-R, App. 74-6. The way was thus cleared for ANICO to take over medical coverage for "The Colonel, Inc.," without LaPaugh and his heart condition.

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[9] Which read bluntly, "Ralph LaPaugh declined due to health history."

[10] "I was not given the opportunity to participate. I am waiving this so that the other 'Colonel' employees may participate."

[11] The Galveston Trial Court misread an Amended Complaint as being directed against "Bobby" Moody, i.e., Robert L. Moody, Sr. The Court, as noted above, would not let counsel reply to correct the error on pain of immediate contempt.

The LaPaugh documents were provided to the trial court in response to the attorneys fee request as evidence of the experience which reinforced Counsel's decision to file suit.[12] They are also unique indications of the sophistication, coordination and patience with which employers and insurers are capable of rigging the ouster of a worker who ***may*** pose a risk of future increased health care costs.

The Houston trial judge on June 20 found "bad faith" on the basis of the recusal motion which had been granted earlier:

> I have not gone back and refamiliarized myself with the transcripts of proceedings before it was transferred to me. What might be a sign of bad faith is that on January 13th, Judge Kent suggested conduct that might be sanctionable, a week later a motion to recuse is filed.

App.-F, App. 47. Earlier in that hearing, the Court expressed disapproval of recusal practice more generally: "The whole business [recusal] is getting almost silly. . . . " App.-F, App. 38.

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[12] Knowledge gained from or of other dealings has been recognized by the Fifth Circuit to be pertinent to assessing the reasonableness of Counsel's actions. See, *Smith v. Our Lady of the Lake Hospital*, 960 F.2d 439, 446 (5th Cir. 1992).

REASONS FOR GRANTING THE PETITION

I. THE PANEL RULING THAT A CLAIMANT FOR WRONGFUL FIRING UNDER ERISA MUST SHOW THAT "THE [EMPLOYER] FIRED HER WITH SPECIFIC INTENT TO PREVENT HER FROM EXERCISING HER RIGHTS UNDER ERISA" CONFLICTS BOTH WITH THE PRECEDENTS OF THE SUPREME COURT AND WITH THOSE OF OTHER CIRCUITS IN SUCH CASES.

A. SUMMARY OF ARGUMENT

The Supreme Court should grant this petition to clarify the requisite showing for wrongful discharge under ERISA Sec. 510, and thereby strengthen Congressional protection upon which millions of American workers rely.

This case presents a problem of increasing importance even without the imposition of Damoclean sanctions. ERISA qualified plans are not only the backbone of the private health care system, but frequently replace worker compensation schemes.[13] As diagnostic techniques improve and medical costs rise, workers with even a hint of chronic health problems will be targeted for illegal firings to avoid increased costs under ERISA qualified plans.

Congress foresaw and forbade the practice with ERISA Sec. 510. Yet that intent has been undermined by the panel opinion in this case by the imposition of a "specific intent" requirement from distinguishable ERISA discrimination cases. Analysis has further been obscured,

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[13] See, e.g., *Carlos v. White Consolidated Industries, Inc.*, 934 F.Supp. 227, 232 (W.D. Tex. 1996), reflective of the growing trend of relying upon ERISA protected health care plans rather than traditional workers compensation insurance.

in this case and otherwise, by ritual application of analysis under the framework of *McDonnel Douglas Corp. v. Green,* 411 U.S. 792 (1973). This Petition confronts the Supreme Court with the unexamined difference between proofs required under "discrimination" cases and ERISA's Sec. 510 discharge prohibition.

ERISA's Sec. 510 prohibition does not target differential treatment of employees, but focuses on the motive for a firing, i.e., the potential accrual of or exercise of benefits, including health care. An action prohibited by ERISA is just as illegal if it is committed against multiple workers as against a solitary employee.[14]

Timing and ***pretext*** are crucial under ERISA. An employer's *perception* of a worker's health prospects may change gradually – or overnight. For that reason, temporal proximity of events and pretext are, in most circuits, sufficient to prove the requisite state of mind, as the Supreme Court, recognized in *Clark County School District v. Breeden,* ___ U.S. ___, 121 S.Ct. 1508, 1511 (July 11, 2001) (*per curiam*).

The *McDonnel Douglas* requirement of a formalized *prima facie* case should be discarded in cases under ERISA Sec. 510. More generally, the Supreme Court, in light of *Reeves*[15] and *Breeden, supra,* should reexamine the continuing utility of the *McDonnel Douglas* forms of action,

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[14] See, e.g., *McLendon v. Continental Can Company,* 908 F.2d 1171 (3rd Cir. 1990) (nationwide "Loss Avoidance Program" in violation of ERISA).

[15] *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 134 (2000)

and explicitly and authoritatively declare temporal proximity and pretext to be sufficient evidence of illegal motivation.

B. CONFLICT WITH SUPREME COURT PRECEDENT

The panel below affirmed summary judgment on a basis which directly collides with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134 (2000).

Reeves, supra, rejected the Fifth Circuit's requirement of "pretext plus". The panel below resurrected "pretext plus" under the rubric of "specific intent", and inserted it as part of the *prima facie* test. This maneuver had the effect of preserving the sanction orders by sidestepping the obvious temporal proximity and pretext which have elsewhere been held to be sufficient. *Clark County School District v. Breeden, supra;* Cf. *Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1195, n.7 (5th Cir. 1992) (retroactive letters probative of pretext).

The corollary to *Reeves,* which the Supreme Court should now make explicit, is that temporal proximity and pretext are sufficient to circumstantially prove discriminatory intent without superimposition of a formal *prima facie* test. *Breeden, supra,* was a step in this direction, but must be made explicit.

Reeves, supra, wrote broadly that "additional evidence of discrimination", beyond *prima facie* proof and pretext, was not required to support a finding of employment discrimination, and defined the " . . . evidentiary burden of plaintiffs who attempt to prove ***intentional*** discrimination through indirect evidence." 530 U.S. at 134 (Emphasis Added).

Reeves has found a halting acceptance in the Fifth Circuit. Compare *Vadie v. Mississippi State University*, 218 F.3d 365, 373, n.3 (5th Cir. 2000) ("*Rhodes*[16] is consistent with *Reeves* and *[Rhodes]* continues to be the governing standard in this circuit") with *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 223 (5th Cir. 2000) (" . . . insofar as *Rhodes* is inconsistent with *Reeves*, we follow *Reeves*"); and *Ratliff v. City of Gainesville*, 256 F.3d 355, 361 (5th Cir. 2001) (same, citing *Russell*).

The "specific intent" requirement in the panel opinion below, App.-A, was lifted whole cloth from distinguishable cases of *discrimination* against plan beneficiaries, e.g., *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 761 (5th Cir. 1996) (modification of plan); *McGann v. H&H Music Company*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 506 U.S. 981 (1992) (limiting HIV coverage); *Hines v. Mass. Mutual Life Ins. Co.*, 43 F.3d 207, 209 (5th Cir. 1995) (change in insurance companies and plans). Proof of "specific intent" is necessary in *plan discrimination* cases to preserve employers' " . . . freedom to manage their plans without governmental interference." See *McGann, supra*, 946 F.2d at 407.

But no such factor is present in *discharge* cases. "Specific intent" is manifest in the selection of the employee to be fired, and Congress in ERISA Sec. 510 has flatly forbidden the firing of employees to improve the insurance risk pool. This important distinction between "discrimination" and "discharge" cases must now be made by

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[16] *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1994) (en banc)

Supreme Court. Not to do so will eviscerate the protection from wrongful firing which Congress sought to enact in ERISA Sec. 510.

C. CONFLICT WITH OTHER CIRCUITS

In *Breeden, supra,* 121 S.Ct. at 1508, the Supreme Court acknowledged that other circuits had adopted a truncated analysis of motive and causation, whereby "very close" temporal proximity was sufficient.

This case would have easily passed muster under the causation standards of the Seventh Circuit, where the *prima facie* test for wrongful discharge under ERISA was described as follows:

> "In order to make out a prima facie case under Section 510, the plaintiff must show that he (1) belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate was present."

Lindemann v. Mobil Oil Corporation, 141 F.3d 290, 296 (7th Cir. 1998), citing *Grottkau v. Sky Climber, Inc.,* 79 F.3d 70, 73 (7th Cir. 1996). *Lindemann* continued:

> "This Court has held that when attempting to establish intent under Section 510 of ERISA, '[p]roof of pretext is required. . . . ' Such proof may be supplied by direct or circumstantial evidence."

Lindemann, supra, 141 F.3d at 296, quoting from *Little v. Cox's Supermarkets,* 71 F.3d 637, 642, n.3 (7th Cir. 1995). Significantly, *Lindemann* also noted:

> "[T]he plaintiff must ultimately show that a desire to frustrate [the plaintiff's] attainment or enjoyment of benefit rights ***contributed*** toward

> the employer's decision and [the plaintiff] can avoid summary judgment only if the materials properly before the district court, ***construed sympathetically***, allow for such a conclusion."

Lindemann, supra, 141 F.3d at 295 (Emphasis Added), quoting from *Teumer v. General Motors Corp.*, 34 F.3d 542, 550 (7th Cir. 1994).

The Sixth Circuit likewise turns on temporal proximity. See *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043-44 (6th Cir. 1992), noting that the "low" burden of the "prima facie" case under ERISA Sec. 510 would be met where an employee was discharged within two months of the vesting of his pension.

In *Kimbro v. Atlantic Richfield Company,* 889 F.2d 869 (9th Cir. 1989), the court applied a test which turns on temporal proximity:

> [P]laintiff may establish unfair reprisal under Title VII by showing "[his] discharge followed [his] protected activities within such a period of time that the court can infer retaliatory motivation."

Kimbro v. Atlantic Richfield, supra, 889 F.2d at 881, quoting *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F.Supp. 318, 324 (D. Mass. 1976), *aff'd,* 545 F.2d 222 (1st Cir. 1976).

In analogous contexts, Fifth Circuit precedent had held that a causal link could be established if the Plaintiff shows that the "discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive." *Shirley v. Chrysler Corp.*, 970 F.2d 39, 42 (5th Cir. 1992). Similarly, causation between knowledge of the forthcoming April 23 test was established by Beddoe's knowledge coupled with her strident March 30 letter and the absence of any apparent investigation by Francine

Moody of the "charges" therein. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998) (rubber stamping of complaints attributes knowledge to decision-maker).

The panel below cited *Stafford v. True Temper Sports*, 123 F.3d 291 (5th Cir. 1997), an ERISA Sec. 510 wrongful discharge case. Yet dicta[17] in *Stafford* conceded that the plaintiff therein had evidence which did " . . . allow for a prima facie case. . . . " *Stafford, supra*, 123 F.3d at 293. That evidence – analogous to Petitioner's case – included the employees' longstanding heart trouble; his daughter's medical expenses; and his being three weeks away from pension vesting. *Id.*

In varying degrees, the above "tests" are all tautologies, as *Breeden* now appears to recognize. It serves no analytical purpose to "define" a *prima facie* case, and then to declare that it may be proved by circumstantial evidence. At bottom, temporal proximity and pretext should be recognized as sufficient under *Reeves* and *Breeden* to prove discriminatory intent in discharge cases under ERISA Sec. 510.

This case provides an ideal and urgent vehicle with which the Supreme Court should finish the analysis begun in *Breeden, supra. Breeden* did not attempt to define what "very close" proximity would be, 121 S.Ct. at 1121, nor to address the types of events which would begin or end the interval of temporal proximity. In this case, the first recorded dissatisfaction with Mrs. Scheve appeared March 30 – barely eleven days after Mrs. Scheve made her

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[17] *Stafford* turned on the collateral estoppel effect of an administrative decision under Mississippi law, 123 F.3d at 295, a factor absent from the present case.

appointment. Mrs. Scheve was worked by the Foundation to within three days of that appointment date before her unexplained discharge.

This is precisely the case for which the encompassing language of ERISA Sec. 510 was enacted. No employer could fail to grasp the risk presented by Mrs. Scheve's impending tests, especially in light of her history and in conjunction with another condition, depression, which was specifically made a part of the criticisms leveled at her. ERISA Sec. 510 by its very terms (" . . . any right to which such participant *may become entitled* . . . ") prohibits firings motivated by such anticipation.

The panel opinion alone (App.-A) would effectively repeal Congressional protection for ERISA plan beneficiaries seeking protection for their jobs and benefits. But the panel below went much further, affirming unprecedented sanctions in fashion described below.

II. THE SUPREME COURT SHOULD GRANT THIS PETITION TO PROHIBIT THE IMPOSITION OF SANCTIONS IN EXPLICIT JUDICIAL RETALIATION AGAINST USE OF THE RECUSAL STATUTES, THEREBY SAFEGUARDING LITIGANTS' CONSTITUTIONAL RIGHT TO AN IMPARTIAL FORUM.

The decisions below do inestimable damage to ERISA, the appellate process, and the justice system, calling for the intervention of the Supreme Court under its supervisory power. It will never be known how many others have been deterred from legitimate filings, or appeals, by such coercive sanction orders. Indeed, if the petition is not granted, the deterrent effect will substantially decrease the likelihood that the Supreme Court will

ever have the chance to address the substantive issues under Section 510 presented above.

The Houston trial court ***explicitly*** retaliated against Petitioners for attempting to protect their constitutional right to an impartial forum by filing a recusal motion. App.-E, App. 47. Informed by Defense Counsel that an appeal was likely, App.-F, App. 34, a sanction award was entered and apparently doubled against counsel in an unsuccessful attempt to stifle that anticipated appeal.[18] The court of appeals cloaked that reprisal in the deferential abuse of discretion standard. *Cooter & Gell v. Hartmax Corporation,* 496 U.S. 384 (1990) (Rule 11 context).

Recusal is not "silly". The Due Process Clause requires a "neutral and detached tribunal". *Ward v. Village of Monroeville, Ohio,* 409 U.S. 57, 62 (1972). Recusal statutes clearly preserve that right, and reprisal against those who invoke recusal, at the trial or appellate level, ". . . can only injure our ability to secure justice."[19]

The panel below did not approach the rigorous inquiry required to affirm such awards. Compare, *Crowe v. Smith,* 151 F.3d 217, 236 (5th Cir. 1998) (Appellate court should, " . . . probe the record in detail to get at the underlying facts and ensure the legal sufficiency of their

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[18] The same trial court had been sharply rebuked by another appellate panel for exactly that type of "fact finding" analysis employed at Summary Judgment. See *Coleman v. Houston Ind. School Dist.,* 113 F.3d 523, 535 (5th Cir. 1997) (E. Garza, J., concurring; describing "fundamental error").

[19] Weinstein, J., "The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge," 120 F.R.D. 267, 284 (1988). Recusal and disqualification statutes at 28 USC Sec. 445 and 28 USC Sec. 144.

support or the district court's more generalized finding of "bad faith"); *Browning v. Kramer*, 931 F.2d 340, 346 (5th Cir. 1991) (Under Sec. 1927, requiring showing with "convincing clarity" that "every facet" of case was "patently meritless").

A trial court abuses its discretion if it proceeds upon an incorrect assessment of the law or a "clearly erroneous" factual determination. *Cooter & Gell, supra*, 496 U.S. at 400-401. Both forms of error were concealed under the panel's invocation of the deferential abuse of discretion standard.

The most obvious legal error[20] by the trial court – and one which should have provoked the most searching analysis of the record – was the explicit finding that the filing of a recusal motion granted by the previous trial judge was "evidence" of bad faith. App.-E, App. 6-7. Although the friction surrounding recusal motions is sometimes alluded to in appellate sanction opinions, see, e.g., *Smith v. Our Lady of the Lake Hospital*, 960 F.2d 439, 446 (5th Cir. 1992) this is the first in which such explicit motives have been recorded, much less tolerated by an appeals panel.

The deferential "abuse of discretion" standard is intended to insulate "fact-intensive, close calls" to facilitate judicial administration. *Cooter & Gell, supra*, 496 U.S. at 404. The trial court made no such "close calls," but made a series of insupportable assertions as "fact", viz.:

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[20] Legal errors of the trial court and Court of Appeals with respect to the substantive case under 29 USCA Sec. 1140 are dealt with above.

1. The court on June 20 accepted Defense counsel's argument[21] that findings of cervical dysplasia could be of no significance to an employer/insurer such as The Moody Foundation:

> Counsel: " . . . [A]lthough there is certainly a risk of a patient who's had an abnormal Pap smear, that risk is probably less than the employee the next [sic] who's had no Pap smear at all."
>
> The Court "We all agree on that. *The unexamined patient is probably at higher risk than the examined modest irregularity.*"

App.-F, App. 26-27. (Emphasis Added). Were that so, Congress would not have passed the Health Insurance Portability and Accountability Act of 1996.[22]

2. On June 20, the trial court continued to rely on the mistaken "April 5 pap smear" allegation in Original Complaint to berate Counsel *in absentia*. Yet that allegation had long since been superseded through discovery which established the correct date was April 23.

3. Earlier, at summary judgment hearing on May 23, the Houston trial court rebuked Plaintiff's counsel for describing cervical dysplasia in the original petition as a "precancerous condition", or one indicating "potential cancer", precisely echoing the earlier criticisms which in part provoked the recusal motion. Compare, App.-B, App. 10 with App.-C, App. 14. Reminded that Plaintiff's

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[21] Counsel's argument was supported by no clinical evidence or any opinion. Counsel Black verbally offered the unsworn, unqualified hearsay statements of his wife, who apparently is an OB/GYN. App. 26-27.

[22] HIPPA, Pub. L. 105-33, Stat. 2016 ff.

terminology was used in reported appellate opinions,[23] the Houston trial judge replied, "And I get my medical advice from the court of appeals." App.-C, App. 14. A physician's affidavit included in Petitioners' reply to the attorneys fee application, explaining in detail the serious potential of Mrs. Scheve's condition, was simply ignored by the trial court.

4. The Court's June 20 estimate of judicial administrative expenses, App.-F, App. 20-21, was unsupported by any evidence and betrayed a court in the process of becoming a self interested advocate:

> . . . The cost of the court reporter, the building, file clerks, the entry clerks, the marshal, court law clerks, secretaries, health benefits to them, and all the rest of the intended costs. If there were a meter in this room, at this point it would probably be in the nature of $3700 an hour. I haven't calculated, haven't seen it lately. But given the ridiculously high salaries we pay law clerks and court reporters, it is probably at least $3500. That's not going to be benefit [sic]. But this case misused that valuable resource in addition to the burden on the other plan benefits [sic] to the Foundation, Stevens has added to the benefit of a whole bunch of innocent, hard working taxpayers.

Possibly on that basis, the Court added $35,230.49 against Counsel, but in favor – not of the taxpayers – but of the Moody Foundation. Such penalties "threaten the court's appearance of impartiality" and create "an unnecessary

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[23] See *Wheat v. United States*, 860 F.2d 1256, 1257 (5th Cir. 1989) (In context of Federal Tort Claims Act stemming from military physician's malpractice; dysplasia an "early warning sign of cervical cancer").

deterrent to the use of the court system." *Blue v. United States Department of the Army*, 914 F.2d 525, 548 (4th Cir. 1990) (Reversing award based on Court salaries, etc.).

This obvious retaliation was passively condoned by an appellate panel which failed to conduct the required inquiry into the sanctions, and fashioned a substantive requirement at odds with its own circuit and prevailing authority elsewhere. The trial and appellate rulings in this case constitute "such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory powers." Supreme Court Rule 10.

III. THE SUPREME COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO DEFINE THE CIRCUMSTANCES AND EXTENT TO WHICH ATTORNEYS FEES MAY BE IMPOSED ON COUNSEL UNDER 28 USC SEC. 1927 OR THE "INHERENT AUTHORITY" OF ANY TRIAL COURT.

The vagueness of the trial court's bench findings, coupled with the perfunctory invocation of "abuse of discretion" by the appeals panel, " . . . fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law," and " . . . distort the appellate process" by establishing circuit law " . . . in a most peculiar, secondhanded fashion", *Cooter & Gell, supra*, 496 U.S. at 404, quoting *Pierce v. Underwood*, 487 U.S. 552, 561 (1988).

At bottom, the trial court and appellate panel imposed the so-called English Rule on Petitioners by means of an unprecedented amalgam of Rule 11, 28 USC Sec. 1927, and the trial court's "inherent authority", as well as a dangerous circumvention of congressional limits

on the summary contempt power of federal courts as expressed in 18 USC Sec. 401. Compare, *In the Matter of Criminal Contempt of Thomas C. McConnell*, 370 U.S. 230 (1962):

> An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice . . . "

McConnell, supra, 370 U.S. at 236. By means of fee shifting rather than jail, the trial court succeded in its attempt to throttle the effective and vigorous representation of a client whose rights to benefits Congress had directly sought to protect.

Before May 23 (summary judgment) the trial court had already decided to impose sanctions. The Court's very first words were couched in terms of Rule 11,[24] and the Houston continued to dramatize the pleadings precisely as the Galveston judge had done: *"Mr. Stevens . . . would a reasonable inquiry into the grounds for a cause of action include looking at the medical record your client claims [sic] reveals cancer?"* App.-D, App. 13. In effect, Petitioners were subjected to an inquiry and hearing on sanctions without prior notice and although Rule 11 had never been invoked by Defense Counsel. U.S. Constitution, Amd. XIV.

Confronted with the above record, the appeals panel retreated to, and affirmed solely on the basis of, 28 USC

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[24] Rule 11 was never invoked by Defendant until after Summary Judgment was pronounced on May 23, and then at the clear invitation of the trial court.

Sec. 1927. Yet the panel failed to completely cite Fifth Circuit precedents, and applied them in contravention of the clear language of Sec. 1927. *See Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980) (restitutionary nature of statute, pre-amendment). The Fifth Circuit had imposed an appropriately heightened degree review both as to cases imposing the cost of defense under Sec. 1927, as well as exercises of the trial court's "inherent power". *Crowe v. Smith, supra,* 151 F.3d at 236 (5th Cir. 1998).[25] In *Browning v. Kramer,* 931 F.2d 340, 346 (5th Cir. 1991), another Fifth Circuit panel reversed and remanded a sanction for the entire cost of defense out of the same district court in Houston, observing that, "It has not been showing with convincing clarity that *every* facet of this litigation was patently meritless." 931 F.2d at 345 (emphasis original).

These issues can no longer be left to the discretion of assorted circuits and panels therein. This case illustrates the manner in which improper factors such as retaliation for recusal may be insulated from effective review by the deferential abuse of discretion standard. Clearer standards from the Supreme Court are now required.

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[25] "The hand of the district court . . . is sometimes wont to be imperial, and when the district court dips into its reservoir of inherent power. . . . [W]e will probe the record in detail to get at the underlying facts and ensure the legal sufficiency of their support or the district court's more generalized finding of 'bad faith.' " *Crowe, supra,* 151 F.3d at 236.

IV. THE SUPREME COURT SHOULD EXERCISE ITS SUPERVISORY POWER REGARDING THE IMPOSITION OF ATTORNEYS FEES AGAINST INDIVIDUAL LITIGANTS CLAIMING WRONGFUL DISCHARGE FROM EMPLOYMENT UNDER ERISA SEC. 510.

This is the first known appellate case in which an individual plaintiff seeking redress solely for wrongful firing under ERISA Sec. 510 has been subjected to a fee award of any kind, much less one for the entire cost of defense.

The fee shifting provision of ERISA, 29 USC Sec. 1132(g)(1), has heretofore been employed only in actions between plans and existing beneficiaries, often brought by unions or classes of participants. A typical application is *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980). Yet the appeals panel affirmed an award of $37,730.49 against a woman who was clearly judgment proof, and in favor of a Foundation with assets, revealed in the record and before the court, of $244 million. Compare, *Kimbro v. Atlantic Richfield Company, supra*, 889 F.2d 869, 881 (9th Cir. 1989).[26]

The fee award against Scheve was financially futile, as the trial court acknowledged on May 23 App.-C, App. 30. But the award was not without motive. It was retaliatory, entered for reasons unconnected to the Congressional purpose behind 29 USC Sec. 1132(g). In addition to retaliation for recusal, the record is replete with visceral

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[26] Affirming denial of attorneys fees by district court, noting "[Defendant] was clearly able to pay its own fees while Kimbro was essentially without resources, and . . . an assessment of attorneys fees against Kimbro might 'dissuade similarly situated plaintiffs from bringing suit.' "

expressions of dislike for Petitioners, e.g., App.-F, App. 47, where the Court refers to Mrs. Scheve as "shady" and suggests that the "stigma should follow the case."

Yet those expressions cannot be reconciled with the trial court's recognition of Mrs. Scheve's medical condition. Like so many ERISA litigants with health difficulties, Mrs. Scheve was "distraught and unable to articulate", as stated by the trial court. APPENDIX F, App. 49. Her evidence on the attorneys fee issue included an emergency room visit for a seizure on April 15, 1999 – barely two business days before her firing – and a bill for $797 for that visit, which would be the last incurred by ANICO for Mrs. Scheve.

In such circumstances, Mrs. Scheve brought this suit. Discovering errors in the pleadings, she and her counsel continued the suit on other, undisputed facts and evidence, advancing theories of temporal proximity and pretext which are recognized in other Circuits and which recently have been recognized by the Supreme Court *per curiam* in *Breeden, supra.*

With ERISA, Congress laid a path towards stability and security for working American families. The holdings below are an unanticipated roadblock. Worse, they are cudgels with which workers will be deterred from even asserting their rights under ERISA, or properly employing recusal mechanisms in suits of any kind.

PRAYER

The Petition should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No 00-40745

TINA SCHEVE,

Plaintiff-Appellant,

AND

MARK W. STEVENS,

Appellant,

VERSUS

THE MOODY FOUNDATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(G-99-CV-379)

June 20, 2001

Before REYNALDO G. GARZA,
HIGGINBOTHAM, and SMITH,
Circuit Judges.

PER CURIAM:*

Tina Scheve appeals a summary judgment on her claim of discrimination in violation of provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1140-41. Scheve and her attorney, Mark Stevens, appeal the award of attorney's fees to the Moody Foundation.[1] Finding no reversible error, we affirm.

Scheve filed a complaint asserting a claim with no basis in fact, which would have been apparent if she or Stevens had conducted even a cursory investigation. Moreover, upon "learning" of the inaccuracy of the allegations, she refused to withdraw the claim and instead asserted a new theory of liability for the first time in her response to the motion for summary judgment.

Summary judgment was appropriate, because Scheve failed to establish an element of her *prima facie* case, i.e., that the foundation fired her with specific intent to prevent her from exercising her rights under ERISA. *See Stafford v. True Temper Sports*, 123 F.3d 291, 295 (5th Cir.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] The court cited several bases for the fee award, including, *inter alia*, ERISA's fee-shifting provision, 29 U.S.C. § 1132(g), for the award against Scheve, and 28 U.S.C. § 1927 for the award against Stevens.

1997). Furthermore, given the groundless nature of the claim and the appellants' persistence in its maintenance, the decision to award the foundation its reasonable attorney's fees cannot be considered an abuse of discretion with respect to either Scheve, *see Ironworkers Local #272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980),[2] or Stevens, *see Browning v. Kramer*, 931 F.2d 340, 344 (5th Cir. 1991) ("[W]hen the entire course of proceedings were unwarranted and should neither have been commenced nor persisted in, an award under § 1927 may . . . shift the entire financial burden of an action's defense.").

AFFIRMED.

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[2] Scheve complains that the court failed properly to analyze the fee award under *Bowen*. Although in its oral order the court did not discuss the *Bowen* factors at length, the court expressly considered each of the relevant factors sufficiently to allow us to conclude that it did not abuse its discretion in awarding fees under § 1132(g). Moreover, other than the conclusional assertion that "under any view of the *Bowen* factors, this fee award was improper," Scheve fails even to argue why the award was inappropriate under *Bowen*.

APPENDIX B

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

TINA SCHEVE	)	No. G-99-CV-379
	)	
-vs-	)	GALVESTON, TEXAS
	)	JANUARY 13, 2000
THE MOODY FOUNDATION	)	
	)	11:11 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SAMUEL B. KENT

(Filed Jan. 25, 2000)

APPEARANCES:

FOR PLAINTIFF: MARK WANDLESS STEVENS
P.O. Box 8118
Galveston, Texas 77553-8118

FOR DEFENDANT: ANDREW J. MYTELKA and
FRED BLACK
Greer, Herz & Adams
One Moody Plaza, 18th Floor
Galveston, Texas 77550

COURT REPORTER: JEANETTE C. BYERS, RPR, CSR

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPH,
TRANSCRIPT PRODUCED BY
COMPUTER-AIDED TRANSCRIPTION

[2] THE COURT: Good morning, everyone. Be seated, please.

I know you-all have better things to do with your time than sit and wait for me. But, unfortunately, my time

is not something I always control. So I apologize for any inconvenience. We're here for a brief hearing in G-99-379, *Tina Scheve versus the Moody Foundation.*

Who's here for the plaintiff?

MR. STEVENS: Mark Stevens, Your Honor.

THE COURT: Hello, sir.

And for the defendant?

MR. MYTELKA: Andrew Mytelka and Fred Black.

THE COURT: Hello.

Look, the reason I asked you-all to come in is because, as Phil Gramm used to say, "Everybody's entitled to their own opinion but they're not entitled to their own facts." And we appear to have such an astronomically disparate version of this case from each side, one or the other of you is either delusional or completely full of horse feathers. And I have not taken none of the discovery. I have not been present for anything. I am not for one instance inferring misconduct nor am I suggesting that one or the other of you is the one full of horse feathers. But with facts this astronomically inoperative, somebody has a completely false picture of this case.

[3] My perception is that given that, we have got to figure out a way to short circuit getting to the essence of what's really true in this case. And if, in fact, it is the case that there was this Machiavellian scheme pursuant to which communications took place between ANICO and the Moody Foundation to deny this poor cancer-ridden woman her benefits, that's terrible. It's awful. We need to

deal with it. We need to barf up some money and take care of this poor lady and get her fixed. On the other hand, if, indeed, it turns out that she doesn't even have cancer or the facts are utterly undeveloped, then, for instance, my concerns about calling Bobby Moody, an agent for the foundation – I mean, you've live [sic] in Galveston long enough to know that whatever Bobby Moody is. He ain't sitting around being an agent for some corporation, et cetera. We've got to this [sic] get narrowed down.

Now, what I want to know is what's on the plate in the next 60 days by way of formal official discovery under oath that will put us in a position to evaluate this case intelligently and with finality?

MR. STEVENS: May I respond, Your Honor?

THE COURT: Please.

MR. STEVENS: I've requested, and I'm sure counsel will respond with dates, wherein I can take the depositions of Mr. McDonald and Miss Moody, the two people who were mentioned as basically the supervisors of the people who, [4] one or the other, made the determination to fire this lady. Also, we will produce Miss Scheve, of course, for her deposition, I believe, on the 25th.

MR. MYTELKA: I'll respond when he is done.

MR. STEVENS: In any event, she's available. She's available. Also, I've indicated to counsel I will go over personally to the records at UTMB. And one thing we want to do to follow this course is to find out what the

paper trail shows and does not show about communications and about dates and times. If, for example, it determines that lab tests weren't even done or completed until after she was discharged, then that's going to probably drop that out of the suit. We may have something to talk about about some other medical problems, but not the cancer business. That is, I believe, what we have on tap at this time.

THE COURT: Does this woman have cancer?

MR. STEVENS: She – Judge, cancer doctors don't like to use the term always. She has indications of irregular pap smears that have put her in the care of an oncologist to do precautionary things like that.

THE COURT: Well, I want to be frank about this. For obvious and personal reasons, the word "cancer" has a telling and profound implication for this Court. And I am not going to take lightly the banding of that term with all of its subjective connotations if, indeed, that is not a definitive [5] diagnosis, which has been handed down by a board certified oncologist. And this better get cleared up quickly or there's going to be hellacious sanctions. That really makes we [sic] angry.

All right. What time frame do we need to get the preliminary discovery made to get this case evaluated with finality?

MR. MYTELKA: Your Honor, if I may address the Court on this issue?

We actually had sent interrogatories and production requests to –

THE COURT: Don't tell me all that. I don't care about the details. What I want to know is give me a time frame to get everything done.

MR. MYTELKA: Your Honor, just – just the relevancy of it is that the answers were due already and we haven't gotten anything from Mr. Stevens. We have subpoenaed the records of UTMB. He told us that Mr. Ed Hannigan was the doctor who performed the pap smear on April 5th. We got the records of Ed Hannigan. He didn't even see the woman until after she was discharged. So now we're trying to figure out where do we go to find out: Did this test occur before she was discharged and how in – in their theory did we know about it? And we have not been able to find that out, Your Honor.

He made an allegation in the petition that it was on April 5th. The next paragraph kind of indicated the results [6] were available that day. The Court assumed the truth of those pleadings in denying the motion to dismiss. We went to Ed Hannigan's office. We subpoenaed those records. Ed Hannigan's records indicated that she didn't even see the doctor until after she was discharged. So we sent basic interrogatories and production requests to Mr. Stevens. They were due this last Monday. We had not gotten any answers from Mr. Stevens yet. I have not filed a motion to compel.

I have talked on several occasions to Mr. Citti. He wanted to know when we're ready to mediate. I told him I have to get the basic facts. I can't even tell my client there's an inference that those allegations could be proven at this point in order for them to realistically

evaluate the case. And so I'm not prepared to take the plaintiff's deposition until I can get the medical records to show that she has the condition she's alleged. And that's what we're attempting to do right now, Your Honor.

THE COURT: All right. I'm going to take these actions in this case: And if I make a determination in this case that one side or the other has been a malefactor in this case, I'm going to pursue this case with all the thermonuclear weapons that are available to an Article 3 Court for the prosecution of the fallacious allegations.

I'm going to – Ross Citti has already been designated as the mediator. I'm going to today appoint him as [7] a special master in addition to his duties as a mediator. He is going to be charged with the responsibility to oversee all remaining discovery in the case. You will coordinate through him your plans, your intentions, what you expect to do, what you expect to gain from that. And he is going to be paid a per-hour rate. And I expect it's going to be in the range of somewhere between 250 and $350 an hour. And I will retain the right to assess the cost of that against the parties and their counsel as the Court sees fit at the conclusion of the case. He will, in addition, coordinate mediation efforts, if any are to take place.

Second, the parties will, under the supervision of the master, produce definitive records, testimony or other materials that will be required to present to this Court clear and compelling and conclusive evidence as to the diagnosis of the plaintiff's medical condition. And I want that done before me at a hearing at 10:00 o'clock a.m. on Friday, March the 3rd, 2000. The special mediator will be

notified by the Court – special master rather – and he will be here as well.

And I'm going to tell you flat out, if there is not compelling evidence presented to this Court that this woman has cancer, as that term is defined in common medical usage at this hearing, I am going to absolutely go nuts. I think this is the most personally insulting allegation to have ever been brought before this Court given the personal circumstances of [8] this Court and I am not going to take this lightly. If it turns out that you brought this lawsuit claiming this woman has cancer when, in fact, she has some irregular cellular structure that doesn't even give rise to that, you're going to be very, very sorry. Am I clear?

MR. STEVENS: Judge, I must say –

THE COURT: Don't you say another word, by God, or I'll hold you in contempt today. Am I clear?

MR. STEVENS: Yes, sir.

(Court recessed at 11:20 a.m.)

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

/s/ Jeanette Byers
JEANETTE BYERS, RPR
January 17, 2000

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

TINA SCHEVE, Plaintiff,	§	
versus	§	
THE MOODY FOUNDATION, Defendant.	§	CIVIL ACTION G-99-379

Interlocutory Judgment

1. Tina Scheve takes nothing from the Moody Foundation (38, 41).
2. By June 2, 2000, the Moody Foundation must either (a) move for the court to assess reasonable costs against Scheve based on a lack of factual support for her complaint or (b) file a one-line pleading waiving its opportunity to shift costs.
3. If the foundation moves for costs, Scheve must respond by June 9.

Signed May 23, 2000, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TINA SCHEVE, Plaintiff; vs. THE MOODY FOUNDATION, Defendant.	CIVIL NO. 99-379 Houston, Texas 5/23/2000 1:30 P.M.

HEARING

BEFORE THE **HONORABLE LYNN N. HUGHES**
UNITED STATES DISTRICT JUDGE

REPRESENTING

THE PLAINTIFF: MARK W. STEVENS

THE DEFENDANTS: FREDERICK E. BLACK
ANDREW MYTELKA

Court Reporter: Anne Traylor, CSR, RPR
Official Court Reporter
515 Rusk, Room 8016
Houston, Texas 77002

PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

[2] **Tuesday, MAY 23, 2000** **1:30 P.M.**

THE COURT: Mr. Stevens –

MR. STEVENS: Yes, Your Honor.

THE COURT: Would a reasonable inquiry into the grounds for a cause of action include looking at the medical record your client claims reveals cancer?

MR. STEVENS: Item one, she claims it reveals dysplasia; Item two, yes, and we did look at the records available.

THE COURT: And when you looked at that, did you see that the test was April the 23rd, 1999?

MR. STEVENS: The date I keyed on, Your Honor, was April the 5th, which was preceded by an abbreviation called LMP, which I did not realize stood for last menstrual period. My client was of the impression that the test was earlier than it was. Now, those were the basis for the original plea.

THE COURT: It's pretty clear that medical records show a test on April 23rd.

MR. STEVENS: That was the final test, yes, sir.

THE COURT: What was the first test, then?

MR. STEVENS: In fact, there were several tests in 1998.

THE COURT: Okay. And those don't have anything to do with this case. And so you brought them up for what [3] purpose?

MR. STEVENS: No, sir, they do have to do with this case, because those tests and the irregularities were

communicated to Debbie Beddoe who was the coworker and later supervisor of Mrs. Scheve.

THE COURT: Mr. Stevens, you've pleaded this woman was diagnosed with cancer, and it was because of that she was fired. The facts are simply not the way you pleaded them.

MR. STEVENS: Your Honor, I've reviewed my pleadings carefully. The referred to possible cancer, qualified language like that.

THE COURT: "Qualified" would be the nice way to describe it. There is no diagnosis of cancer; there is no diagnosis of possible cancer, is there?

MR. STEVENS: I disagree with that.

THE COURT: Show me where in the records there is a diagnosis of possible cancer, other than the fact that it exists, of course.

MR. STEVENS: She has a diagnosis of dysplasia, which the Fifth Circuit regards is an early warning sign of cancer.

THE COURT: You know, and I get my medical advice from courts of appeals. That's where I get my medical advice. Early warning signs are not cancer.

You are weaseling on the question. There is [4] no diagnosis of cancer. Period.

MR. STEVENS: I agree, and I hope that's correct. My client hopes that's correct, too.

THE COURT: All right. Mr. Stevens, we're trying to address a case that you brought about a year ago.

MR. STEVENS: Yes, sir.

THE COURT: We're not addressing our hopes and fears for her personal – this is not personal. This is business.

MR. STEVENS: Yes, sir.

THE COURT: And it's a peculiar kind of business, it's called law.

But since you brought it up, on May 23rd, 2000, there is no diagnosis of cancer in her life.

MR. STEVENS: I believe that's correct.

THE COURT: She was fired on April 20th, 1999 for what is documented poor performance. There were counseling sessions, there were reprimands, warnings, however you want to characterize it. The foundation had done some paperwork about her performance. That's true.

MR. STEVENS: It's true with a qualification, that she never knew about it.

THE COURT: It doesn't matter whether she knew about it. I didn't say she knew about it. I said the foundation had done some paperwork to support its evaluation [5] of her performance.

MR. STEVENS: They had placed papers in the file as much as a year after the event claimed.

THE COURT: And what does that mean?

MR. STEVENS: Pretext.

THE COURT: And when was the event?

MR. STEVENS: The event they are referring to took place, I think, the date was May the 6th of 1998, and that was, as the Court notes, about a year before and about one raise and one promotion before.

THE COURT: If her performance is the pretext, then what was the cause of her termination?

MR. STEVENS: We maintain it was her – and I have to go on what our position is and what the summary judgment evidence –

THE COURT: Just tell me what the facts are.

MR. STEVENS: The facts are that she, my client, Mrs. Scheve, told Debbie Beddoe in a number of circumstances, there is a number of instances that she was having bad or irregular Pap smears.

She has pointed to a phone call which is documented by one of the sheets in evidence, I think it is the March 16th or thereabouts, in which she made the appointment for April the 23rd, and told Debbie Beddoe what that was for, and very shortly after that these papers on [6] March 30th and April, I think, the 1st or the 4th were generated and placed in her file without Mrs. Scheve's knowledge.

And we maintain the proximity in time, approximately 11 days is evidence supporting a conclusion, a judicial or factual conclusion that she was fired because she was potentially fixing to enter the realm of people who are designated with cancer. And that tracks precisely ERISA statutory line which says, if they're fired, to keep them from attaining or asserting some benefit.

THE COURT: Mr. Stevens, do you know – how old is Mrs. Scheve?

MR. STEVENS: I believe she's approximately 34-years-old.

THE COURT: And do you know what the recommended frequency of Pap smears would be in standard urban medical practice in America for a 35-year-old-woman?

MR. STEVENS: I don't purport to be an expert, but I think it's something in the order of annually or semiannually.

THE COURT: So following your logic, Mr. Stevens, the Moody foundation would have to fire the entire female staff once a year.

MR. STEVENS: No, sir, not when you have a circumstance where there are irregular smears, where they are [7] voiced to the people and where – to the supervisors, and where they then go back and paper the file with memoranda asserting so called bona fide causes of discharge that are more than a year old.

THE COURT: All right, then, let's go – when was the next earlier Pap smear before April 23rd, 1999?

MR. STEVENS: My recollection tells me it would have been in the summer of 1998.

THE COURT: And before that?

MR. STEVENS: There were several in a cluster. I can't be more specific.

THE COURT: Would a cluster be annually?

MR. STEVENS: No, sir. I believe there were several in a row. Part of this may have been done – and I

haven't been able to decipher these records myself – but part of it may have been due to bad samples.

It's hard, quite frankly, to tell from the records, but it's clear that she had irregular, at least one irregular smear and was due to have another one and did so in '99.

THE COURT: When is the test that you're describing as irregular?

MR. STEVENS: I beg your pardon?

THE COURT: When was the test that you are describing as irregular?

[8] MR. STEVENS: My memory tells me it was March of 1998.

THE COURT: So, because of an irregular Pap smear result in the spring of '98, she then followed that up one year later with her routine annual physical. Without a cluster, we have an annual visit to the doctor. Where is a cluster of medical visits –

MR. STEVENS: Judge –

THE COURT: – of any kind?

MR. STEVENS: There were a number of different visits in '98, and I believe there were several different appointments in 1999 which did not result in what I'll call appropriate samples for biological reasons.

THE COURT: How many times did she see a doctor about gynecological problems in 1999?

MR. STEVENS: I think there were – and I'm going from memory, Judge, I think there were a couple of

appointments before the April 23rd. There were supposed to be Pap smears, and specimens could not be taken.

And these were all communicated with the subjective fears of Mrs. Scheve to her coworker and boss, Ms. Beddoe, who, by the way, purports not to remember any of this but doesn't deny it.

THE COURT: When – if the April 23rd was the test, when were the failed tests?

[9] MR. STEVENS: When were the which test, sir?

THE COURT: What you described as the failed test.

MR. STEVENS: The failed tests? Earlier in 1998, I believe.

THE COURT: No, I mean, that they didn't get the tests done.

MR. STEVENS: I'm sorry, earlier in 1999. I believe there were two of those.

THE COURT: When?

MR. STEVENS: I believe they were in February and January, Judge, going from memory.

THE COURT: And why didn't Mrs. Scheve go to the doctor in January of 1999.

MR. STEVENS: I don't recall offhand, sir. She had a number of things going on, including emotional difficulties, this kind of thing.

THE COURT: What else did she have going on?

MR. STEVENS: Well, see, I think she got back from February – I think she just got back on February 4th.

THE COURT: And would she have been seeing the same doctor?

MR. STEVENS: No. I think that would have been a different doctor, an orthopedic surgeon.

THE COURT: Well, besides her shoulder problem and her emotional problems, what other problems was Mrs. Scheve [10] having in the spring of 1999?

MR. STEVENS: You mean medically indicated problems, Your Honor? I think that's about it. I think that's about it.

THE COURT: Was she having an irregular period?

MR. STEVENS: That entered into the Pap smears, because she kept bleeding; and that interferes, apparently with taking proper sample for a Pap smear.

THE COURT: You said at the end it may be true. I'm just not sure we got the facts.

Did she report to her doctors irregular periods? And a that's –

MR. STEVENS: I don't recall. I recall issues having to do with her taking hormones for birth control purposes and sometimes that's part and parcel of it.

THE COURT: All right. She apparently was having some secondary effects of birth control hormones.

MR. STEVENS: There seems to be a possibility, judging from what the files say.

THE COURT: Almost anything is possible, Mr. Stevens. This case is a year old. These are things that are absolutely knowable from your clients on records.

All of her doctors keep records. They're not ordinarily legible, but with some work with the physician, they can be made to speak. And the records each express [11] subjective apprehensions and actual symptoms of complaints. The doctor would write a different thing in the records for it, for fear of cancer, then irregular period, intermitted vaginal bleeding between periods or any one of a number of gynecological symptoms.

Cancer, being what it is, virtually any symptom can be a symptom of cancer. Cancer takes a great number of guises.

She went to the doctor. Whether she went in January or February for a Pap smear or she didn't until April is not a material distinction.

The irregularity was perceived in the spring of 1998. Her generalized apprehensions about cancer –

Is there cancer in her family? This kind of cancer?

MR. STEVENS: Not this kind. I know her mother is under treatment, but for a separate kind.

THE COURT: But that was –

MR. STEVENS: Not this kind of –

THE COURT: That would give you pause, though, wouldn't it?

MR. STEVENS: It's a risk factor.

THE COURT: Well, people tend to worry about things that happened close to them. You lose a friend in a car wreck, you worry more about car wrecks. Doesn't have to be a [12] relative. And that's not genetic.

Apparently cancer is one of those intonations of mortality that causes you to worry about.

Anything else about her medical history?

MR. STEVENS: No, I think it's laid out in the motions, Your Honor.

THE COURT: Now, did Scheve apply for any benefits that she did not receive between April of '98 and April of '99?

MR. STEVENS: On one occasion she applied for medical benefits and learned at that time that her policy had been canceled as of the day of her firing April 20th. Besides that I'm not aware of any.

THE COURT: I'm sorry, up until April 20th?

MR. STEVENS: That's right. No, I think those have been it, Judge.

THE COURT: Other than her shoulder problem and her physical from the spring of '98, did she make any claims against the benefit plan?

MR. STEVENS: I think the juncture on March 16th, she obviously was going to make a claim.

THE COURT: My question, Counsel, was in the past perfect.

MR. STEVENS: No.

THE COURT: Thank you.

[13] THE COURT: So, essentially, Scheve says she was fired to protect her employer from having to pay fringe benefits for medical treatments that were indicated to be imminent by two facts. Beddoe was told of Scheve's fear of cancer, and Beddoe knew of the April 23rd doctor's appointment.

MR. STEVENS: Third fact: Beddoe regarded this seriously, as Mrs. Scheve did, as indicated by her counsel and her comments to Ms. Scheve. Yes, that's correct.

THE COURT: I'm sorry?

MR. STEVENS: Ms. Beddoe, Debbie Beddoe, I believe the summary judgment evidence recites in the affidavit and so forth that she told Ms. Scheve that was nothing to fool around with or words to that effect. Ms. Beddoe appeared to be concerned, and she took it to be –

THE COURT: Without psychoanalyzing Ms. Beddoe, you wouldn't have to be a supervisor, or even a woman, to know that if somebody has an indication that, a symptom, that they ought to check it out.

MR. STEVENS: Yes.

THE COURT: If it is a symptom in a sensitive place, like brain, heart, reproductive tract, one shouldn't, under no circumstances, delay getting competent medical treatment. Neither the employer nor the coworkers at the coffee room in a competent forum for the appraisal of [14] people's medical conditions, although we all know a lot of what goes on. Many many competent doctors routinely second-guess, frequently to the detriment of the patient.

So, Beddoe is concerned for her coworker, but then turns that concern around to the employer's benefit and fires her so she doesn't make a claim on the policy based on Bedow's [sic] expectation of the results of tests to be done three days later.

MR. STEVENS: Can't say it's solely Beddoe, Your Honor; but she's the one after we know about having this information.

THE COURT: And Moody is dead. So who else is sitting around plotting against a low-level margin worker, I mean, of course, Scheve was a receptionist/ bookkeeper, right?

MR. STEVENS: Uh-huh, yes, sir.

THE COURT: Who else is plotting against her?

MR. STEVENS: I have no idea who else might have taken position in this, Your Honor. We simply can relate the facts as we have them.

THE COURT: Well, you actually – and I don't believe that Beddoe came up with this. I believe counsel came up with the integration conspiracy between the Moody Foundation and American National Insurance.

MR. STEVENS: It's because I have seen that in a case six years before, Your Honor; and the Court at Galveston [15] had ruled on it and the matter went past summary judgment; but I sought not to include those matters in my pleadings and materials.

THE COURT: In other cases all kinds of other things might have happened.

MR. STEVENS: These happened including a man named Robert Moody, who's [sic] offices is [sic] on the 3rd floor and deals with insurance.

THE COURT: There are a lot of people named Moody.

MR. STEVENS: He's a member of that family.

THE COURT: There are a lot of members of that family.

MR. STEVENS: There are.

THE COURT: I had one arrested once. None of that bears on this case, does it?

MR. STEVENS: That does not.

Referring to the Court's remark about the one that was arrested, of course, I'm not terribly sure in the state of discovery that the matters that I observed some years before wouldn't have a relationship, and we didn't need them, I felt, at this stage.

THE COURT: And tell me what you think dysplasia is.

MR. STEVENS: Dysplasia is an irregularity of cervical or uterine cells that is considered by some to be an [16] early warning signal of cancer, and which in itself indicates – I'm phrasing this in lay terms – but closer scrutiny of the patient, places them at a high risk of category for this type of cancer.

THE COURT: Would it be fair to say it's the clinical presence of abnormal but noncancerous cells, and

they're not tumors, in the sense that you can have a benign growth, significant threat to your health?

MR. STEVENS: I'm sorry, I didn't understand.

THE COURT: You could have a benign –

MR. STEVENS: Yes, yes.

THE COURT: Doesn't have to be a cancer at that point.

MR. STEVENS: Sure.

THE COURT: It's the culpable presence of cells that are abnormal, noncancerous and not sufficient in the extent to be described as a tumor.

MR. STEVENS: That meets with my lay understanding, yes.

THE COURT: Mr. Black?

MR. BLACK: Yes, Your Honor.

THE COURT: Is that your understanding?

MR. BLACK: I'm sorry?

THE COURT: Is that your understanding?

MR. BLACK: Of his –

[17] THE COURT: Of dysplasia. Not "his." Of dysplasia. In the real world.

MR. BLACK: I think it is. I happen to be married to an Ob/Gyn. I discussed this case with her, and I think although there is certainly a risk of a patient who's had an abnormal Pap smear, that risk is probably less

than the employee the next who's had no Pap smear at all.

THE COURT: We all agree on that. The unexamined patient is probably at a higher risk than the examined modest irregularity.

Anything you want to add to what's been discussed in the papers?

MR. BLACK: No, Your Honor. I think we stated our position quite clearly, and Your Honor has asked the appropriate questions.

THE COURT: The retroactive memos are equally likely to be explained by the foundation's dissatisfation, which ripened into a fire before the examination, even if it is equally likely that the addition of the memoranda to her file was triggered by knowledge of her appointment for the damage, the equal likelihood makes her not carry the burden. But it is Scheve's subjective apprehension of cancer, however expressed and to the level expressed, plus a minor irregularity in April 1998 medical exam which neither the doctor nor Scheve felt necessary to double check until the [18] spring of 1999 – she may have felt the need to check it in the winter of 1999, but that's still nine months versus 12 months – that is not, as counsel described it, a cluster of gynecological visits. Those visits that there [sic] were also in conjunction with other noncancerous gynecological concerns.

Scheve cannot, by discussing her medical history with her coworkers and supervisors, insulate herself from ordinary operation of the office. She cannot convert a

doctor's appointment for an examination to retaliation for a condition.

I can imagine circumstances where an employer could extrapolate from existing knowledge a rationale, however, vicious conclusion that it would safe [sic] money by terminating as employee. This is not that case.

Ms. Scheve has had a mixed bag of work experiences, and the people to whom she confided her problems promoted her, gave her a raise, tried her out in a new job. It didn't work. They fired her.

If Beddoe was suffering under delusion that her responsibilities, including calling it lame, sick from a work force, she would have done it after Scheve expressed her fears of cancer after the adverse Pap smear in the spring of 1998 not ten months after she promoted her in August of '98.

If Beddoe was doing actuarial calculations of fringe benefit cost, she would not have promoted an employee [19] and given her a raise, whom she had been told by the employee had these medical problems.

It is not likely that if the April 23rd test had showed an exacerbation of the 1998 condition that it was not even arguably covered in any event that she had been fired several days before for conditions that she had been seeing a doctor for some time.

She is attempting to convert her fear of a condition she did not have, does not have, into a defense to the foundations evaluation of her performance.

Her complaint about her performance evaluation is that the memoranda were not filed till later. There isn't a

legal requirement to file the memoranda at all. There is no legal requirement to counsel.

She attempted to get two other people to say incriminating things. Harold McDonald, Francis Moody either told the truth as they understood it or repeated the party line, depending on your point of view; but in any event, they furnish no evidence to support Scheve's side of the argument. It is her responsibility to evidence her claim.

There are people who are seriously ill. People for whom their fringe benefits are life. There are people who are injured on the job for whom compensation benefits are some compensation. There are people who are cheated out of their ERISA benefits.

[20] If Ms. Scheve had been eligible for continued post employment coverage, she would have had her examination paid for. She was not eligible for that, so, Finer could not have taken that away from her.

The foundations having fired Scheve took away her fringe benefits, her salary, and even for a poor employee, considerable investment in her own self esteem.

It is the case that even the poorly performing workers have emotional investment in their jobs. None of those have anything to do with trying to protect the foundation's cost structure or its benefits plan.

The premise of this case is bad economics and bad law; and most egregiously in this case the hard facts that had to be known to Scheve and counsel are different from the way they were artfully equivocally pleaded to give the impression of a post examination termination.

The facts here do not support a claim on reasonable investigation, could not have been reasonable [sic] thought to have supported a claim.

I will enter a judgment that Scheve take nothing from the foundation.

The foundation has until June 2nd either to move for a reasonable assessment of cost based on the lack of factual support for the complaint or to file a one-line pleading waiving its opportunity to shift costs.

[21] If the June 2nd pleading is a claim of compensation, Scheve has until June 9th to respond. I will look at the pleadings on the 2nd and the 9th.

Mr. Mytelka, do you now have any idea what the client's preference will be?

MR. MYTELKA: I do not, Your Honor. I'll discuss that with the client, and I'll also discuss that with Mr. Stevens.

THE COURT: Ordinarily these sorts of equitable adjustments in the cost of litigation are more trouble than they're worth. So, I don't mean to impose on the foundation to dig no cost. I have no personal interest one way or the other.

MR. MYTELKA: I understand.

THE COURT: As a bureaucrat, I wish there were more.

But it seems to me that on the facts of this case that Ms. Scheve should bear some of the costs of her extortion in suit.

Anything else, Mr. Stevens?

MR. STEVENS: Nothing more at this time, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: Nothing, Your Honor.

THE COURT: Thank you, counsel.

[22] (Proceedings concluded.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

6/1/2000

/s/ Anne Traylor
Anne Traylor, CSR, RPR

APPENDIX E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

TINA SCHEVE, Plaintiff,	§	
versus	§	CIVIL ACTION G-99-379
THE MOODY FOUNDATION, Defendant.	§	

Final Judgment

(Filed Jun. 23, 2000)

1. The Moody Foundation recovers from Tina Scheve and Mark Wandless Stevens jointly and severally $37,730.49 for costs and attorneys fees.

2. The foundation recovers from Mark Wandless Stevens $35,230.49.

Signed June 22, 2000, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TINA SCHEVE	*	CV-G-99-379
VS.	*	Houston, Texas
THE MOODY FOUNDATION	*	June 20, 2000 10:19 a.m.

HEARING

(Filed June 22, 2000)

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE DEFENDANT:

Andrew J. Mytelka and Frederick Black
Greer, Herz & Adams
Attorneys at Law
One Moody Plaza, 18th Floor
Galveston, Texas 77550

Court Reporter:
Johnny C. Sanchez, CSR, RMR, CRR
Houston, Texas 77002

Proceedings recorded by mechanical stenography. Transcript produced by computer-assisted transcription.

[2] THE COURT: Mr. Black, when did you find out about this hearing?

MR. BLACK: This – let's see. It was the day his response was due, I believe. I remember thinking that

you had set the hearing before he even filed his response. I think that was that Friday week ago. June 12th. I knew before his response had been filed, I knew of the hearing.

THE COURT: You didn't get it faxed on the 7th, did you?

MR. BLACK: It may have. I just knew by that time.

THE COURT: Do you have it?

MR. BLACK: I don't believe I do, with me.

THE COURT: Well, because Mr. Stevens is not here, we called and he's just not sure he had known about it, and the staff checked the docket. Fax number we have for him was in fact his correct fax number, because that's how they are sent out by the computer, not by people. And other than the exchange of replies in the motion for extension of time, had you-all talked to Mr. Stevens in connection with the motion, cross motion?

MR. MYTELKA: Your Honor, after the last hearing, you had made a request that we could either waive costs or file for costs. I went and sought permission of my client who gave me permission, offered Mr. Stevens to just drop [3] this thing, we'll waive our request for costs. He just give [sic] us a release and agree not to appeal. In a 408 communication from him, he denied that request and demanded about $60,000 from us.

THE COURT: And when was the last time you've talked to Mr. Stevens about this case?

MR. MYTELKA: I believe Mr. Black –

MR. BLACK: He came into my office the day his response was due and requested for the extension, which I was more than happy to accommodate him on.

THE COURT: For some reason I never saw that.

MR. BLACK: You never saw the extension?

THE COURT: Because he's in the Galveston Division. So by the time it got here, I was on vacation.

MR. MYTELKA: We didn't oppose his request.

MR. BLACK: It was Friday to Monday. We talked about settlement, I cannot recall whether we talked about hearing or not.

MR. MYTELKA: But our efforts to just get this over with –

MR: BLACK: I again reiterated our desire to settle it, and he made a very high demand for his client.

THE COURT: Tell me about this Paul versus John Aldin case. It seems to focus large in Mr. Stevens' world than –

[4] MR. MYTELKA: Your Honor, I was somewhat tangentially involved in that case. At the time there was a, I believe he was not the pilot, but a chief mechanic on a vessel called The Colonel. The Colonel is a museum designated under the tax laws in Galveston. It was originally funded by The Moody Foundation. Mr. LaPaul** was – had some medical conditions at the time. The carrier was John Aldin Life and John Aldin Life basically didn't want to pay for Mr. LaPaul's** treatments, and there was a lawsuit then filed.

The agent on that case was Robert Moody, Jr. And, frankly, I have no idea why that's at all related to this case because it doesn't involve any of the same issues.

THE COURT: Robert L. Moody, Jr. was the salesman for the policy?

MR. MYTELKA: He was the broker.

THE COURT: That's just a salesman that charges more.

MR. MYTELKA: You're right, Your Honor. It is Robert Moody, Sr.'s son. He is an insurance broker in Galveston.

THE COURT: Do you know who Joy Clayton is?

MR. MYTELKA: I do.

THE COURT: Who is that?

MR. MYTELKA: Joy Clayton is the president of the [5] Colonel Museum, Inc.

THE COURT: And what was the resolution of LaPaul** versus John Aldin Insurance?

MR. MYTELKA: I believe that there was a small token settlement.

MR. BLACK: I believe there was also a confidentiality agreement. I haven't seen it.

THE COURT: No. I don't want you to violate confidentiality, but it didn't go to trial?

MR. MYTELKA: It did not go to trial, and it is not related at all to any of the issues in this case, Your

Honor. And I was kind of mystified when I read his response.

THE COURT: Can you help me with the disciplinary complaint with Judge Kent?

MR. MYTELKA: I cannot, Your Honor, because I was not aware of it until I read about it in a local fax "Legal Rag" that goes around Galveston. I didn't even know he had filed it.

THE COURT: Is that the daily news?

MR. MYTELKA: No. That's a different one. In my opinion it would be, but it's something called "The Law Facts" put out by the law office of Greg Ginose**. Frankly, I asked Mr. Stevens about it after the fact, and he told me that we weren't parties to it and weren't necessarily to be [6] notified about it, and wasn't.

THE COURT: And this complaint arises out of this case?

MR. MYTELKA: It does. Judge Kent took offense at Mr. Stevens claiming that this woman had cancer in light of his own personal situation. And he also took offense at saying that we knew about it before she was fired and the tests hadn't even been performed. And in light of that exchange, Mr. Stevens filed a motion to recuse, and apparently complained to the Fifth Circuit.

THE COURT: Well, you know, a judge doesn't develop a prejudice when he learns the facts of the case, but is subjected to behavior of the lawyer. Prejudice is pre-part, it's prejudgment. It is not intemperate or personal to say that the judge or lawyer or the client, "What you say is not true. You are misrepresenting what you

knew." In the case of Mr. Stevens, Ms. Scheve complains what was easily knowable. Even if I take him at his word that he misunderstood the dates, you could not misunderstand the dates after a reasonable investigation.

I'm reminded of the lawyer who recused the judge on grounds of personal bias because the judge had sustained 99 percent of his opponent's objections. The fault lies not in the judge's personal interest but in the lawyer's questions. This whole business has become almost [7] silly, and it's touchy to people that –

MR. MYTELKA: Your Honor, in response, though, to Mr. Stevens' excuse, we have hard time buying it because in his initial disclosures he didn't even give us the right doctor that performed the tests. So I don't understand how he could have reviewed records and then got it wrong when he didn't even give us the right doctor. And we spent a couple of months trying to get that fact nailed down.

THE COURT: The first is the suit should not have been filed without his having reviewed the medical records.

MR. MYTELKA: Agree.

THE COURT: The date of the testing which he mischaracterized as a cancer diagnosis, but that even for whatever it was, the date of that testing, the date of that diagnosis is critical. In his response he carried on at some length about whether it was their perception and they had other ways of perceiving. First, there needs to be an objective reality at some point to some of the claim;

second, her claim is that based on that diagnosis, the Foundation perceived.

If she knew what the diagnosis was, you don't have to talk to the doctor, you don't have to go read the doctor's handwriting. Ms. Scheve knew the difference between the beginning and end of April, as I recall. Mr. Stevens exhibited the trouble and tendency to recuse [8] this case with no facts other than Ms. Scheve's, the facts that the Aldin case and then just abstract conceptions of evil in the world of insurance employers health and general life.

MR. MYTELKA: He's not very fond of the Moodys, Your Honor, and believes there's a lot of Mafia conspiracies going on down there.

THE COURT: And that – the Moody's could have earned an absence of fondness.

MR. MYTELKA: That is possible.

THE COURT: They could have engaged in Mafia conspiracies, all without ever touching Ms. Scheve's life. And my problem is not am I going [sic] put the Moodys individually or collectively up to canonization, but whether there is a factual basis for a legally recognized claim in federal court involving Tina Scheve and The Moody Foundation itself.

MR. MYTELKA: And, Your Honor, we've made our request under three separate basis. [sic]

THE COURT: I've got one better. He sued them a couple of times, I've put a couple of them in jail.

MR. MYTELKA: That's true.

THE COURT: My experience with some of them under some circumstances have been difficult, but that's no more being prejudice than it is prejudice to ask what the facts are.

[9] MR. MYTELKA: Agreed. And that member of the family, Your Honor, passed away several years ago and had nothing to do with this case.

THE COURT: I think his executive assistant who is named.

MR. MYTELKA: Mr. Revi**, Norman Revi**. I unfortunately have met him. He's still a fugitive from justice, Your Honor.

MR. BLACK: And has nothing to do with this case.

MR. MYTELKA: And has nothing to do with this case.

THE COURT: I understand. And even if he were the executive director of the Foundation, the object here is to try the facts of this case, not life in Galveston, not the history of the Moodys, not even the history of Tina Scheve. It's only the rule of law, the facts used in support of the claim are relevant to the legal basis of the claim. This is not "Geraldo."

MR. MYTELKA: Agreed, Your Honor.

THE COURT: Not even "60 minutes."

MR. MYTELKA: And the three basis [sic] we assert were not only just Rule 11 which Mr. Stevens focused on but ERISA under statute, and that once he

knew of the true facts, he continued this litigation, which I believe violates 28 USC 1927.

[10] THE COURT: There are cases which Mr. Stevens found them talking about narrow construction of those statutes because they are punitive, in both cases there's nothing wrong. Rule 11 you can indeed be punitive, at least been practiced by some of my colleagues. The inherent power of the Court in ERISA statute in section 1927 of Title 28, are intended entirely to be compensatory. This is illustrated best by Mr. Stevens on pleadings where he says that had he had to do a reasonable investigation, it would drive up litigation costs. But that's not true. It only drives it up for him. He has attempted to shift the burden of preparation from himself to The Moody Foundation. And the idea is kind of economic gorilla [sic] warfare that 1927 is designed to prevent. It is also designed, since I believe the only fair construction of vexation, given 1939 terminology would be that it is also designed to compensate defendants for extortionist plaintiffs, the cost of litigation is so high that simply by filing lawsuits you can occasionally extort it. A settlement that's for uninsured clients and bad lawyers is a lot more than you deserve.

So I guess the trouble I have is Ms. Scheve had the ability to know the factual basis of her claim. She knew who had said what, presumably, to whom she had said what to The Moody Foundation. She knew what whom she had seen when for medical care, and she knew what the doctors [11] had told her, and they told her.

As Mr. Stevens eventually reluctantly conceded, that this medical examination was a routine annual physical

that was in connection with she had been having problems, but that's why people have annual physicals. The original phrase was, well, it was part of a series of tests that she was having. And then on being pressed, it seems serious for a spring physical. He eventually and reluctantly conceded that she was having some hormonal birth control related complications which were unrelated to the tests in April of '98, was it?

MR. MYTELKA: '98? '9, I believe, Your Honor.

MR. BLACK: Yes.

THE COURT: It is impossible to characterize Stevens' behavior as poor performance. Lawyers make mistakes. But in this case he willfully persisted after the objective facts contradicted his main them [sic] and his mind theme, he also willfully persisted in injecting what I will call the character offense of simply attacking the Moodys. Some Moodys Foundation Insurance companies. I can't contribute that to Ms. Scheve, however, that she was probably angry with the Foundation. Most people who are fired are. That she was concerned about her health, I will assume. But she knew what the diagnosis was, she went into the test, she knew that it was a regular annual examination [12] and that she chose to present this as a claim. After all, she had to first go to Stevens at some point, she had to talk to him, she had to set out about presenting a grievance against the Foundation.

Once counsel supplied a nature of claim, it had to be clear to Ms. Scheve that the facts were not consistent with the theory that Stevens came up with. And it is, after, all her case. The recovery would have been half or 60 percent hers. Some of the cases under 1927, they oblige the

District Court to segregate that which was vexatious from that which was plausible.

Since the medical records were available, since the client knew the diagnosis at the time as well as the workplace, it is impossible to see that this case should have been filed. Had it been filed, the plaintiff's initial disclosure should have contained all of the material that ultimately defeated the claim. And the Court allowed Stevens more leeway in the add progress in this case then it ordinarily would have because it would be important to make sure we understood the facts.

The problem is Stevens did nothing to furnish the Court with clarity or precision in the factual basis. Stevens is a lawyer, practices in the state and federal courts, and you all have asserted, conceded in a multi million dollar verdict recently.

[13] MR. MYTELKA: He was local counsel on a case against, Your Honor, against Honda.

THE COURT: But it would be pointless if we construed the rules for adjusting the cost of litigation to treat lawyers as if they were wards of the court. The case under 1927 or Rule 11, says, Oh, well, he was just ignorant and inept, and requires a finding of elements. He's a standard of bad faith hired to make sense. I have, by my recollection, and given in almost 21 years, this is probably not a very good recollection, but I believe I have sanctioned lawyers under Rule 11 on three occasions. I have more often shifted costs to the parties under the theory that is their case, they are the principal, the lawyer is the agent. It was the lawyer's idea the principal agent to work that out among themselves, not here.

In this case, however, while some of the responsibility is Ms. Scheve's, she apparently is judgment proof, and part of Stevens economic arrangement is that he will advance the cost in exchange for recovering them and a significant share of the award if there is one. And I have no complaint with contingent fee arrangements, but the economic reality of it is that Stevens chose to promote this case rather than disabuse Scheve of the notions that she had a claim, that a good lawyer would have done because he believed he stood some chance of badgering of The Foundation [14] into a settlement, in which he would have profited.

It is the Court's conclusion that the easily available, direct facts from client and the client's doctors were sufficient categorically to contradict the correct the [sic] theme presented, the main theme presented by counsel. The theme had to have come from the lawyer. His continual injection of wholly extraneous cases, facts, personalities, secondary and tertiary relation with people connected to the Foundation cannot just be a sloppy concept of relevance. It is an abusive use of litigation, both gratuitously to slander and not only to extort money from people with money and with apparent preexisting grievances between counsel, but his economic motivation in filing this suit are no facts in refusing to disclose the facts that were known and knowable as the rules require makes the entire case, even up until his response to the motion for pleadings.

Interestingly, on Page 1 of his reply, he reiterates the fact that Ms. Scheve had been promoted and then fired. That's one of the facts that makes his malice, his ulterior motive theory false. The seven months before was during

the period, once he expanded past the April limit, his theory was that she had chatted in the breakroom constantly about her health problems and that other persons being sued, had been told about these problems was before the promotion. He can't have it both ways.

[15] He mentions in his response that this will chill suites [sic] against ERISA. That may read or rescind that makes one of the things the statute intended. It says that. And the idea that Mark Wandless Stevens is helping provide low cost medical care to the workers of America by this kind of mean spirited, mindless litigation, is dilutional. [sic]

Exhibit 1 is an affidavit of Kevin Barrett, a physician. The affidavit was taken June 6. Even if Dr. Barrett had furnished an affidavit of sufficient detail to be reliable for Court use, which it is not, it still addresses an after-the-fact diagnosis. And we have Dr. Barrett commenting on Judge Kent's jurisprudential observation [sic] as if they were a medical observations, which is theoretical.

Whatever Dr. Barrett had to say about Ms. Scheve's condition while she was an employee of Moody Foundation should have been said within 45 days of the cases having been filed and furnished to The Foundation's counsel promptly.

And do you believe it's the case that under the ERISA cost shifting statute that counsel may be liable?

MR. MYTELKA: I believe that the cases, Your Honor, don't exactly address. It says the party, the prevailing party. I don't – I don't know of a case that actually says under ERISA it can go to the attorney. I [16] think in

the case that we cited the Court to Kirby versus General Electric case, they did the analysis under both ERISA, Rule 11 and 1927 reaching the result.

THE COURT: Actually, 1927 speaks to the lawyer specifically.

MR. MYTELKA: Absolutely.

THE COURT: Rule 11, as I recall goes both ways.

MR. MYTELKA: It does, Your Honor.

THE COURT: I'm going to asses [sic] the cost of this party under the ERISA standard under counsel 1927 Rule 11, and under both my [sic] on my inherent authority. If Ms. Scheve is in fact impecuniousness [sic] and unemployable, I trust The Foundation knows what to do.

MR. MYTELKA: Understood, Your Honor.

THE COURT: But poor, disgruntled, unemployable people sometimes bring malicious lawsuits. And that's wrong, in fact. Sometimes their motivation is that they have nothing to lose. And while that's true, a judgment against them is some cold comfort for the aggrieved litigant. Because she had the ability what the diagnosis was and when it was, she certainly knew who her doctors were when she saw them and that information was not furnished, contradicted the them the [sic] lawyer came up with, she is culpable. She apparently, from what The Foundation tells me, is probably not able to satisfy the award, but she does [17] need to be deterred. Those lawsuits, of course, have no benefits to all plan members and benefit to any plan member, in fact, the lawsuit,

given the smallness of the proof, was a substantial imposition on the plan and all of its members, and the claim had no merit.

I have not gone back and refamiliarized myself with the transcripts of proceedings before it was transferred to me. What might be a sign of bad faith is that on January 13th, Judge Kent suggested conduct that might be sanctionable, a week later a motion to recuse is filed.

The idea that a lawyer should be able to file his relationships with the bench in a case by either his behavior before court, his behavior that's shown in the record towards other counsel, aren't as factual and legal misrepresentations of the case itself, and then attack the Judge because the Judge who had the reservoir of patience and goodwill exhausted by the misbehavior of the lawyer and then the lawyer gets new judge is preposterous, even though I don't think that the aggravated conduct of Stevens during the course of the litigation was something Ms. Scheve came up with, misguided litigants, those who are motivated by pure malice or economic malice, I'll call it, also can change lawyers. The stigma should remain with the case; otherwise, what you do is encourage shady clients to find [18] shady lawyers and fire that lawyer, and after he's done what both of them thought should have been done and the new client arrives with a new shady lawyer, there seems to be a, if not inexhaustible supply, an abundant supply of both kinds of parties, it makes no sense to treat this as if the misbehaving lawyer does it for his own account is spontaneous, especially on the facts of a case with no factual basis. If it were simply in-court misbehavior, the lawyer turn [sic] and insulted the judge, or squabbling with witnesses or the other

lawyer, that would be wholly separate from the client's position.

Actually, you could almost rely on Mr. Stevens' reply to the motion as grounds for the motion. He says that 1927 requires subjective bad faith. If by that he means he has to confess to that bad faith, he's wrong; I don't expect him to do that. He has demonstrated by his behavior, positions that any fully informed, disinterested person would find to be beyond error in any of the realm of manipulation.

The fee requested by The Foundation under the circumstances is imminently reasonable. The time and labor, as demonstrated by the public record, is substantial. While the factor of novelty and difficulty in the question presented needs to be divided, the questions were not novel, factually, legally or procedurally, but they were difficult [19] behavior. Everything about this case that raised costs were because of the obstructionism is skilled for everything except patience, was of a medium level when the patience required was of high level. No other employment was precluded other than other similar employment. A customary fee in the community is equal to or above, in this community, we'll use Galveston standard, which I presume is slightly lower than it might be in Houston. The net profit is probably higher in Galveston since the cost of living is lower. The fee was hourly, so there's no adjustment for that, no time limitations affected the case. The amount involved and the result obtained very neutral factors, The Foundation won, but that's not a tremendous success, just a paid for. The experience, reputation and ability of the lawyers are good, but they're reflected in the hourly fee that they're

routinely able to collect from astute clients. The case was not undesirable in any political community since. Counsel were not stunned by their representation. And the nature and length of the relationship of the client does not affect the computation and awards in similar cases, but would ordinarily be by an hourly basis for the trouble your client was put to through counsel.

Under ERISA, the award is $849 – $800.49 of costs, attorneys fees of $36,930. And that's against Ms. Scheve. Under the most generous construction of the [20] vexation prolongation, I will deduct $2500 for the award under 1927 as under any construction of Ms. Scheve having been distraught and not able to articulate – none of which is in the record, but so $800.49 of cost and $34,430 of attorney's fees are awarded against Mark Stevens for vexatious prolongation, and under Rule 11, the essential facts in this case that the shadow of a reasonable investigation produced, would have produced facts contradicting the pleadings. So the entire amount would be $800.49 and $36,930 will be awarded against Tina Scheve and Mark Stevens under Rule 11. The total amount is shifted jointly and severally to the client and the lawyer under the Court's inherent power not to punish anybody but to deter malicious and extortionist litigation.

And, of course, as expensive as defense counsel are, taxpayers of America furnish this forum as a resource for bona fide disputes between other people in the community who can not [sic] settle them on their own. The cost of furnishing this facility is very high. It is not my take home pay, which is index of the costs consumed, especially by Stevens' prolongation of his. The cost of the

court reporter, the building, file clerks, the entry clerks, the marshal, court law clerks, secretaries, health benefits to them, and all of the rest of the intended costs. If there were a meter in this room, at this point it would probably [21] be in the nature of $3700 an hour. I haven't calculated, haven't seen it lately. But given the ridiculously high salaries we pay law clerks and court reporters, it is probably at least $3500. That's not going to be benefit. But this case misused that valuable resource in addition to the burden on the other plan benefits to The Foundation, Stevens has added to the benefit of a whole bunch of innocent, hard-working taxpayers.

Anything else for the foundation?

MR. MYTELKA: Your Honor, would the Court prepare an order?

THE COURT: Based on the findings that are in the record, we will prepare an order.

MR. MYTELKA: Thank you, Your Honor. Nothing further.

THE COURT: Anything else?

MR. BLACK: No, Your Honor.

THE COURT: All right. Thank you.

(A recess was had)

COURT REPORTER'S CERTIFICATE

I, Johnny C. Sanchez, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Johnny C. Sanchez
Johnny C. Sanchez, CSR,
RMR, CRR

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40745

TINA SCHEVE
Plaintiff-Appellant
and
MARK W STEVENS (Filed Aug. 2, 2001)
Appellant
v.
THE MOODY FOUNDATION
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas, Galveston

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ON PETITION FOR REHEARING EN BANC

(Opinion 06/20/01, 5 Cir., ___, ___ F.3d ___)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge

in regular active service of the court having requested that the court be polled on Rehearing En Banc [FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES
41 FOR STAY OF THE MANDATE.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE:

The Complaint of Mark W. Stevens Against United States District Judge Samuel B. Kent, Southern District of Texas, Under the Judicial Conduct and Disability Act of 1980.

Docket Number: 00-05-372-0042

ORDER

(Filed Feb. 10, 2000)

Mark W. Stevens, an attorney, complains that United States District Judge Samuel B. Kent allowed himself to be influenced by personal considerations and acted intemperately at a hearing in a case Stevens filed in Judge Kent's court and that Judge Kent has acted intemperately on other occasions. Stevens recognizes that the merits of a lower court's rulings cannot be reviewed in connection with a misconduct complaint brought under 28 U.S.C. § 372, and disclaims any intent to seek such review here. We have carefully examined Stevens's allegations and the record of the proceedings below. Appropriate corrective action has been taken, and this proceeding is therefore CONCLUDED pursuant to 28 U.S.C. § 372(c)(3)(B).

/s/ Carolyn Dineen King
Carolyn Dineen King
Chief Judge

February 8, 2000

APPENDIX I

[LOGO] GREER, HERZ & ADAMS, L.L.P.
One Moody Plaza, 18th Floor
Galveston, Texas 77550-7998

Telephone: (409) 797-3200
Facsimile: (409) 766-6424
URL: www.greerherz.com

FACSIMILE COVER SHEET

Recipient(s)
Mark Stevens

Firm

Facsimile:
(409) 765-6469

Telephone:
(409) 765-6306

Attached is a copy of the entire fax we received; that is, the Order Setting Hearing, along with the clerk's cover sheet.

Sender: Andrew J. Mytelka

Date: June 26, 2000 [Per Request /s/ MWS]

Client/Matter: Tina Marie Scheve

Number of Pages (Including Cover Sheet): -3-

If you do not receive all of the pages, please call (409) 797-3200 and ask for Cheri.

The information transmitted in this facsimile is privileged and confidential information intended solely for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby

notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify the sender by telephone for further instructions. Thank you.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

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	§	
Tina Scheve	§	
	§	CIVIL ACTION
versus	§	[illegible]-99-379
	§	
The Moody Foundation	§	

Order Setting Hearing

1. A hearing will be held before Judge Lynn N. Hughes on:

June 20, 2000
at 10:00 a.m
Courtroom 11-C, Eleventh Floor
United States Court House
515 Rusk Avenue
Houston, Texas 77002.

2. To insure full notice, each party who receives this notice must send a copy of it to every other party even if they may have been sent one by the court.

3. Each party must appear by an attorney with (a) full knowledge of the facts and (b) authority to bind the client.

4. The court will decide motions, narrow issues, inquire about expected motions, and schedule discovery. Counsel are to consult among themselves about these matters well in advance. *See* Fed. R. Civ. P. 16.

Signed on June 6, 2000, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

LABOR CORPORATION OF AMERICA - Houston
7207 N. GESSNER
HOUSTON, TX 77040 (713-856-8288)
PAMELA D. HOLDER, M.D.
C.A.P. 21069-01 H.H.S. 42-1037 MEDICARE 45D0663318

5/07/99 PAGE: 11:21A

PATIENT NAME : SCHEVE,TINA	ACCESSION : 190918-2
PATIENT ID : 215802801	REQUISITION: G3297519
PATIENT PHONE:	REPORTED : 5-MAY-1999
HOSPITAL ID :	RECEIVED : 24-APR-1999
SEX: F AGE: 31 DOB: 19-NOV-1967	COLLECTED : 23-APR-1999 00:00
SS# WARD: ROOM:	REASON :

PHYSICIAN : LYONS, PHYS/UPIN#:
CLIENT NAME : GULF COAST MEDICAL GROUP,PLLC CLIENT ID : 77058
MANAGED CARE ACCOUNT LOCATION :
1300 BAY AREA BLVD
HOUSTON TX 77058

TEST REQUEST : PAP SMEAR,GYN;PHYSICIAN READ PAP;DR. MARY LYNCH;

ADDITIONAL INFORMATION:
SOURCE (CYTOLOGIC): CERVICAL/ENDOCERVICAL/VAGINAL
POSTOPERATIVE DIAGNOSIS: LMP DATE: 5-APR-1999
PATIENT DIAGNOSIS/HISTORY: Routine Pap Smear,Cancer screen

TEST NAME	NORMAL RESULTS	ABNORMAL RESULTS	UNIT	REFERENCE RANGE

PAP SMEAR,GYN:
SPECIMEN ADEQUACY:
Endocervical cellular component identified.
SATISFACTORY for evaluation.
GEN. CATEGORIZATION:
EPITHELIAL CELL ABNORMALITY
DESCRIPTIVE DIAGNOSIS
HIGH GRADE SQUAMOUS INTRAEPITHELIAL LESION
encompassing: Moderate dysplasia (CIN II).
Rare cells suggesting possible higher grade lesion are present.

HORMONAL STATUS:
Moderate estrogen effect.

RECOMMENDATIONS:
Suggest further work-up, colposcopy and/or biopsy if clinically indicated.

CYTOTECH: B. Luce, CT(ASCP)
PATHOLOGIST: Mary Lucien Lynch, M.D.
(original signature on file)
FOOT NOTE:
The Pap smear is a screening test designed to aid in the detection of premalignant and malignant conditions of the uterine cervix. It is not a diagnostic procedure and should not be used as the sole means of detecting cervical cancer. Both false-positive and false-negative reports do occur.

HC HC HC HC HC HC HC HC

PLAINTIFF'S EXHIBIT 1-A

AGE 1 FINAL REPORT FOR SCHEVE,TINA 77058 7-MAY-1999
Adult reference ranges unless otherwise specified

00655

BEST AVAILABLE COPY

APPENDIX J App. 58

APPENDIX K

To: Harold C. MacDonald
Frances A. Moody
From: Deborah J. Beddoe DB
Date: March 30, 1999
Re: Tina M. Scheve

Tina Scheve has shown a complete lack of respect for her immediate supervisor.

It started when Tina was promoted to accounting clerk.

After Tina was promoted, she went around the office telling people she was offended having to work under me, due to the fact that she has more experience.

Since then Tina has repeatedly shown me that she is going to do what she wants when she wants. I have told her that there is no reason she should have to work through her lunch everyday unless to save an hour or two to leave early for any special occasions. I have told her that I would like her to take her lunch hour from 12:00 to 1:00 as I do so if I need her to work on something in the afternoon she will be available. She continues to take her lunch whenever she pleases, 2:00, 2:30 just whenever she wants.

I have tried to show her as much as I can to help her with her day-to-day job responsibilities and I told her whenever she is not sure about something to come to me and we will work through it together. When she was out on short-term leave I started doing some of her work to

help keep her caught up. In doing so I discovered quite a few things miss-filed, or incomplete. When I got ready for the year end audit I discovered that the market prices were not looked up and logged for all our securities, Stocks and Bonds and I was faced with having to complete them from August to December. When I asked her about it she said she didn't understand how to do it. I told her next time to ask me so as not to let things get so far behind again. Since she has been back to work I have worked very closely with Tina going over her job responsibilities and helping her in any way that I can, and I thought we were working together very well and getting along just fine. I feel like I have been a fair and understanding supervisor and I have never been overly demanding about anything. I thought things were going quite well between us.

Until recently.

(A bit of history: Tina's boyfriend and my Husband are both members of the LaMarque Fire Department and Tina likes to hang around up there in her spare time.)

I have more than one witness on the following documentation – I'm telling you this just show [sic] *lack of respect for her supervisor and show how she slanders my name outside the work environment.*

Following her Dec. 3rd surgery

Tina proceeded to tell everyone at the LaMarque Fire department that she was informed that I could not handle my work load with her gone and because I was incompetent I would be fired upon her return and she would be given my position. Also, while Tina was out on short-

term leave her boyfriend to everyone that I was constantly harassing Tina by calling her at home telling her she needed to get back to work and made her cry all the time. When I asked her about this she said someone was out to get her at the fire department and made everything up just to get her in trouble at work.

I never called Tina at home to ask her when she would be returning to work. I mostly got messages from Lucinda or Pat that Tina had called to give an update on her condition including fracturing her shoulder a couple of weeks before she initially said she would be back to work. Tina called me personally one time during her short-term leave and all I told her she [sic] was that she was missed and I was looking forward to her returning to work. The only thing I mentioned about her coming back to work was that we would need some documentation from her doctor and a release form.

Again, once confronted with this she denied it all. Saying someone at the Fire Department made it all up to see if they could get in her in trouble. So we brushed it all under the table and forgot about it. However, my husband had two years with that department before Tina started dating one of the members, and during that time my name was never mentioned. I am a very private person and I do not like my personal life or professional life discussed by anyone.

Wednesday night, March 24th, Tina went up to the Fire department and told the guys on duty, including my husband that she does all the work in the finance dept. while I play on the computer all day. Then came to work Thursday morning and told me that my husband was

saying all kinds of bad stuff about me up there. This is absolute Bull. My husband is not that kind of person. He is also very private and does not discuss our personal life at that department.

Basically I'm tired of her putting me in the hot seat by spreading lies and rumors about me. I have been an employee for The Moody Foundation for six years now and have never been through anything like this before with any other co-worker or supervisor. I feel that I have bent over backwards trying to help her adjust to her responsibilities and all I get for it is public slander.

APPENDIX L

MEMO

TO: Personnel File
FROM: Pat Ennis
DATE: 4/5/99
SUBJECT: Tina Scheve

Tina Scheve was hired as a full-time employee by The Moody Foundation in June, 1997. She accepted the salary offered and the position of receptionist, fully knowing her job responsibilities. Shortly after being hired, she began complaining that she was not paid enough for someone with her experience. She was even overheard by employees, including myself, telling guests in the reception area that we did not pay well.

The first part of 1998 Tina began experiencing many personal problems. Her boyfriend of eight years left her and she became very depressed and difficult to get along with. Her bad moods were reflected in her telephone voice. Most employees here had received complaints about our receptionist and her demeanor on the phones. A class was set up for several of us to attend on phone manners and how to handle difficult situations on the phone. Tina did not seem to want to participate in the class and acted as if she was bored the entire time. A slight improvement was noticed after the class, but it was short lived.

Tina became more depressed and finally went to see a doctor about the problem. Her physician put her on medication for the depression and Tina missed work for

an entire week with the excuse that she was trying to get adjusted to the medication. I questioned her on why it took so long and she became very agitated. I only questioned it because I have dealt with family members suffering from depression and they never missed a day of work or school when put on a new medication. Tina came to my office some time in February or March of 1998 and began yelling at me because I was not understanding and had no idea of what she was going through. Several people in the office heard this because she was so loud. This can be confirmed by Marilyn Roden, Harold MacDonald, Debbie Beddoe and Sandy Griffin.

Tina was not what could be called a "team player". She did not want to participate in things the rest of the office was doing. Examples of this are: not having her photograph taken for the annual report, her attitude during our telephone seminar, and missing the first two staff meetings (February 25 and May 5, 1998). When Tina did finally attend a staff meeting, she felt that the hour she had to spend in the office for lunch should be considered comp time.

One particular incident which was very unsettling for the entire office occurred on May 6, 1998. Tina returned to work after being off with her daughter who was ill. This was the day after a staff meeting. When she walked in that morning Doug casually commented, "Tina, you missed a good meeting yesterday." She immediately became combative, and began yelling at Doug in the hallway outside our kitchen. I do not remember the exact words spoken, but the gist of the conversation was that next time her daughter was sick, she would bring her in her pajamas and put her on the sofa in our reception area.

She then came to my office and began yelling at me because I did not take her side regarding how she said Doug talked to her. Once again, several employees in the office heard the way she spoke to Doug and to me.

Tina was overheard more than once using profanity on the phone with her ex-boyfriend while guests were in the reception area. I heard it one day and told her that if she needed to make a personal call, I would be happy to take her place while she went to another telephone for some privacy. This is totally unacceptable and unprofessional behavior.

All of 1998 and the one month she has worked in 1999, Tina has had a problem getting to work on time. She continued to average being fifteen minutes late even after being talked to.

Another problem is excessive absences. In 1998 alone, Tina missed over 54 days of work, not counting holidays and any vacation she may have had left after using part of it for sick days. Attached is a list of days missed in 1998.

On at least one occasion, Tina changed times on the Daily Log before faxing it to the Dallas Office. Attached is a copy of the March 9, 1999 log. She wrote over the time she left that morning and used liquid paper to cover up and change the time she returned.

Tina is no longer under my direct supervision, but I have noted that she continues to be late to work, she continues to be moody and almost rude to people at times, and still has a poor attitude about working at The Moody Foundation.

** TX CONFIRMATION REPORT ** AS OF APR 05 '99 15:17 PAGE.01

MOODY FOUNDATION

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	CMD#	STATUS
14	04/05	15:16	MOODY FOUNDATION	UF—S	01'17"	006	041	OK

Facsimile Cover Sheet

To: Francie Moody
Company:
Phone:
Fax: (214)219-3408

From: Pat Ennis
Company: The Moody Foundation
Phone: (409)763-5333
Fax: (409)763-5564

Date: 4-5-99
Pages including this cover page: 6

Comments:

Please advise me of any changes you would like made to this document.

Per Francie 4-16-99 Personal file
File in Tina's

PLAINTIFF'S EXHIBIT

APPENDIX N

(LOGO)

MOODY INSURANCE GROUP, INC.

JUNE 14, 1990

ROBERT MOODY, JR.
601 MOODY NATIONAL BANK BLDG.
GALVESTON, TX 77550

CUSTOMCARE GROUP STATUS

RE: COLONEL MUSEUM

IN ORDER TO COMPLETE THE INITIAL REVIEW OF THE ABOVE GROUP THE FOLLOWING INFORMATION IS REQUESTED:

1. PROPERLY COMPLETED AND SIGNED PARTICIPATION AGREEMENT FORMS:

   A. COMPLETED EMPLOYER PARTICIPATION AGREEMENT FORM.

2. COMPLETED GROUP ENROLLMENT ACTIVITY FORMS (3032) ON THE FOLLOWING:

   ~~A.~~ ~~LaPAUGH - #9~~ (PERMANENT FULL TIME EMPLOYMENT DATE)

   ~~B.~~ [CROSSED OUT]

   ~~C.~~ [CROSSED OUT]

   ~~D.~~ [CROSSED OUT]

3. DOCTOR'S NOTES ARE REQUIRED ON THE FOLLOWING IN ORDER TO GIVE FURTHER CONSIDERATION. NOTE: IT IS THE RESPONSIBILITY OF THE AGENT/APPLICANT TO OBTAIN THIS INFORMATION.

   A. [CROSSED OUT]

4. TAKEOVER INFORMATION REQUESTED:

   A. COPY OF JUNE PAID BILLING STATEMENT.

   B. SAMPLE OF BENEFIT BOOKLET.

5. OTHER INFORMATION REQUESTED:

   A. RALPH LaPAUGH DECLINED DUE TO HEALTH HISTORY.

THE FILE HAS BEEN RELEASED TO THE UNDERWRITING DEPARTMENT FOR FURTHER REVIEW. UNDER NO CIRCUMSTANCES SHOULD A PROSPECTIVE GROUP DISCONTINUE ITS PRESENT INSURANCE COVERAGE WITHOUT WRITTEN NOTICE FROM AMERICAN NATIONAL THAT NEW COVERAGE HAS BEEN APPROVED AND IS IN FORCE.

SINCERELY,

MONICA WARE
MOODY INSURANCE GROUP, INC.

Note: On the following page, the notation at the bottom may not be clear. It reads, "I was not given the opportunity to participate. I am waiving this so that the other "Colonel" employees may participate.

APPENDIX O

GROUP ENROLLMENT ACTIVITY FORM

New Enrollment Change Terminal

Group Policy No	Unit Number	Social Security Number	Home Office Use
		041032118530	

Last Name of Employee	F.I	M.I	5	6	7 Birth Date
Ralph	R	A	☑ 1 Male ☐ 2 Female	☐ Married ☑ Single	Month 05 Day 21 Year 41

Street	City	State	Zip
PO Box 1211	Glastonbury	CT	06033

HOME OFFICE USE ONLY

9 Permanent Full Time Employment Date: Month ___ Day ___ Year ___

10 Plan of Insurance

Name of Employer & Subsidiary	12 Employee Status	13 COBRA Effective Date
Colonial Mutual Insurance	☑ Active ☐ Retired ☐ COBRA ☐ Medical Leave of Absence ☐ Other Leave of Absence	Month ___ Day ___ Year ___

Occupation or Class	15 Salary	16 Salary Mode
Pharmacist	$ 12,141.00	☐ Hourly ☐ Weekly ☐ Monthly ☐ Semi-Monthly ☐ BiWeekly ☑ Annual

COMPLETE IF ANY COVERAGE IS DESIRED

Check one of the following:

☑ Coverage for the Employee Only (Also complete box 18 to waive dependent coverage)

☐ Coverage for both the Employee and Dependents (List Dependents in box #21 below)

I hereby apply for Group Insurance and authorize my Employer to make the necessary payroll deductions, if required.

Date of Application ___ Signature of Applicant ___

Beneficiary Name: ___ Month Day Year

Relationship: ___ Date of Birth

Spouses Employer

COMPLETE IF ANY COVERAGE IS TO BE WAIVED

Where no coverage is desired, check and sign below:

☐ Waive Spouse Coverage

☐ Waive Dependent Coverage

☑ Waive All Coverage on Self and Dependents

☐ I have selected an HMO Health Plan through my Employer and waive the Employer Health Plan

☐ Other ___

~~I hereby certify that I have been given the opportunity to participate in the Group Insurance Plan underwritten by American National Insurance Company and have declined to apply on behalf of the above-indicated.~~ I realize that subsequent election will require that I furnish satisfactory evidence of insurability to American National Insurance Company.

18 Signature: Ralph A. Palaugh Date: 6-15-90

James of Employee and Dependents	Birth Date Month	Day	Year	Relationship Employee	Place of Birth	Sex	Height Ft. In.	Weigh
Ralph A. Palaugh	05	21	41	Employee	Middletown Conn.	M	5'9"	170

* I.E.T.: I WAS NOT GIVEN THE OPPORTUNITY TO PARTICIPATE. I AM [illegible] PARTICIPATE.

BEST AVAILABLE COPY

Ralph E. Lathrop
P. O. Box [illegible]
Galveston, Tx.
8-24-96
Group # 54123-[illegible] 100

MS. PRESTON,

BEFORE I SEND YOU ANY MORE INFORMATION,
I WANT TO KNOW WHY ROBERT MOODY JR.
IS RECEIVING COPIES OF MY CORRESPONDANCE.

Ralph E. Lathrop

00651

APPENDIX Q

(LOGO)

MAILING ADDRESS
P.O. Box 50090
Phoenix, AZ 85076-0090
602-438-7600
1-800-328-4316

John Alden®
LIFE INSURANCE COMPANY

September 7, 1990

Ralph A. LaPaugh
P.O. Box 2418
Galveston, TX 77553

Re:	Insured:	Ralph A. LaPaugh
	Patient:	Self
	Group Number:	341268-40-I00
	Group Name:	The Colonel Museum, Inc.

Dear Mr. LaPaugh:

We are in receipt of your note dated August 24, 1990. Thank you.

Mr. Robert Moody is the agent for the group you are insured with. It is John Alden policy that when an investigation is begun, the agent receives copies of all our correspondence with the insured.

If you have any further questions, please do not hesitate to contact our office. We look forward to receiving your response to our August 17, 1990 letter.

Sincerely,

/s/ Susan J. Preston
Susan J. Preston
Claims Analyst
Group Claims Department

SP/jm

cc: Robert Moody, Jr.

APPENDIX R

MAILING ADDRESS
P.O. Box 50090
(LOGO) Phoenix, AZ 85076-0090
602-438-7600
1-800-328-4316

John Alden®
LIFE INSURANCE COMPANY

October 1, 1990

Mr. Ralph LaPaugh
P.O. Box 2418
Galveston, TX 77552

CERTIFIED

RE: Insured Employee: Ralph LaPaugh
Patient: Self
Employer Group #: 341268-40-I00
Employer Name: The Colonel Museum, Inc.

Dear Mr. LaPaugh:

We recently received medical expenses incurred by yourself for services rendered by the following providers:

Ahmad Internal Medicine	Allenworth Internal Medicine
David Internal Medicine	Dr. Moorman
Dever Internal Medicine	UTMB Dept. of Psychology
Cochran Internal Medicine	Wallace Internal Medicine
Wiggins Internal Medicine	Dorsey Internal Medicine
Lisse Internal Medicine	Dr. Rubin
Farrell Internal Medicine	Dept. of Radiology
Reinarz Internal Medicine	Dunsford Pathology
U. of Texas Medical Branch	Dr. Andrews
Harrison Pathology	Dr. Blackwell
Daniels Internal Medicine	Emergency Medical

In reviewing these claims we noted medical information previously unknown to us. As you know, at the time you enrolled for coverage, we asked you to complete an Evidence of Insurability card. Your eligibility for insurance coverage with our company was, to a great extent, based on the information included on this card.

Your Evidence of Insurability card, signed February 15, 1990 did not mention any previous medical history. Had our underwriting department been aware of this information at the time of your enrollment, your eligibility for insurance coverage with our company would have been affected.

Under the circumstances, we feel it is now necessary to take the action which we would have taken had the previous medical information been revealed to us at the time of your enrollment. We regret we will be unable to provide coverage for you dating back to the original date of your certificate.

We have notified our Group Administration Department of our decision. They will be refunding, to your employer, any premiums paid on your behalf.

The above information was reviewed with careful attention, fairly and impartially. If you have any additional information which you feel would alter our decision or

should you have any further questions, please do not hesitate to contact our office.

Sincerely,

/s/ Susan Preston
Susan Preston
Claims Analyst

SP/jm

cc: Robert Moody Jr.
601 Moody Bank Bldg.
Galveston, TX 77550

APPENDIX S

CASE HISTORY: By a determination dated October 23, 1990, the claimant was disqualified under Section 5(b) of the Texas Unemployment Compensation Act beginning September 30, 1990, and continuing until the claimant returns to employment and either works for six weeks or earns wages at least equal to six times the claimant's weekly benefit amount because the claimant was discharged from the last work because of misconduct connected with the work. The claimant appealed.

FINDINGS OF FACT: Before filing the initial claim for benefits effective September 30, 1990, the claimant last worked from June 3, 1988, through September 30, 1990, as chief engineer for the employer, a cruise boat.

Smoking on the boat is a violation of written policy. It was a common practice, however, the claimant smoked in the engine room. Others smoked all over the boat: the wheel house, the lounges, the gift shop, on the deck. A relief captain smoked. The Master, the ultimate authority on board, did not smoke himself, but observed and allowed the practice. On one occasion, the assistant director of the organization smoked a cigarette on the deck.

A new Master assumed control in July, 1990. It is his intention to enforce all rules, as written. He, however, never so advised or even mentioned smoking to the claimant or two of the claimant's witnesses.

Nevertheless, the claimant was discharged for smoking on the boat. The Master saw him smoking in the engine room on September 28, 1990. The Master said nothing at the time or during the two days the claimant worked,

thereafter. He discharged the claimant October 1, 1990, by means of a message left on the claimant's answering machine.

CONCLUSION: Section 5(b) of the Act provides, in part, that an individual who has been found by the Commission to have been discharged for misconduct connected with his last work shall be disqualified until the claimant has returned to employment and either worked for six weeks or earned wages equal to six times his weekly benefit amount.

Section 19(q) of the Act defines "misconduct" as the mismanagement of a position of employment by action or inaction, neglect that places in jeopardy the lives or property of others, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure orderly work and the safety of employees, but does not include an act of misconduct that is in response to an unconscionable act of an employer or superior.

In this case, smoking on the boat was a common event, both allowed and, in some cases, practiced by management. The employer chose not to routinely and uniformly enforce any rule to the contrary, and thus, condoned the practice. The claimant's selective discharge then, was not for any act that can be defined as misconduct connected with the work. Accordingly, no disqualification is in order under Section 5(b) of the Act.

DECISION: The determination dated October 23, 1990, disqualifying the claimant beginning September 30, 1990, under Section 5(a) of the Act, is reversed.

/s/ Stephanie Urban
Stephanie Urban
Hearing Officer

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